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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK

FROM AND INCLUDING DECISIONS OF DECEMBER 10,
1918. TO DECISIONS OF MARCH 4, 1919,

WITH

NOTES, REFERENCES AND INDEX.

J. NEWTON FIERO,
STATE REPORTER.

VOLUME 225.

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AUG 4 1919

JUDGES OF THE COURT OF APPEALS.

FRANK H. HISCOCK, CHIEF JUDGE.

EMORY A. CHASE, *

FREDERICK COLLIN,

WILLIAM H. CUDDEBACK,

JOHN W. HOGAN,

BENJAMIN N. CARDOZO,

CUTHBERT W. POUND,

CHESTER B. McLAUGHLIN,

FREDERICK E. CRANE, *

WILLIAM S. ANDREWS. *

* Justices of the Supreme Court serving as Associate Judges by designation of the Governor, under section 7 of article VI of the Constitution, as amended in 1899.



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CASES DECIDED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

COMMENCING DECEMBER 10, 1918.

In the Matter of the Application of CHARLES S. WHITMAN, Respondent, for a Judicial Review of Ballots under Section 381 of the Election Law.

ALFRED E. SMITH, Appellant.

Elections — purpose and scope of section 381 of Election Law — ordinary writ of mandamus authorized thereby — when affidavit insufficient to warrant issuance of writ — court cannot, under section 381 of Election Law, direct production of protested, void or blank ballots — Appellate Division cannot, under section 381, order judicial review of ballots cast — order of Appellate Division modifying order is appealable of right to Court of Appeals.

1. Section 381 of the Election Law (Cons. Laws, ch. 17) empowers the court, under the requisite allegations in behalf of a candidate voted for at an election and sufficient proof, to require, through a writ of mandamus, the board of canvassers of the return of the inspectors of election, to recanvass and correct the errors in the original canvass of the protested, or void, or blank ballots. The writ of mandamus so authorized is the ordinary writ and the ordinary and established rules and procedure are applicable to it.

2. The applicant must, by written and verified allegations, present to the court facts which, if true and unavoids by the defensive facts, prove that he is under a grievance or injury which the writ would remedy and that he is entitled to that remedy, and the averments presenting those facts and essential to the issuance of the peremptory

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Statement of case.

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writ cannot be upon mere information and belief of the affiant. Hence an affidavit, in a proceeding under this section, which does not aver that the inspectors of election made an error or omitted any duty, is insufficient to empower the court to issue a writ of mandamus.

3. Section 381 of the Election Law authorizes exclusively the application for the writ, and the order for and its issuance in accordance with the established rules relating to that remedy. It does not contain any provision empowering the court to order the custodian of the protested, void or blank ballots to produce those ballots to the court for any purpose. And the court cannot by the effect of any of its provisions direct the production of them.

4. No provision of section 381 empowers the Appellate Division to institute or order, as a proceeding, "a judicial review of the ballots cast," or to order the Special Term to enter upon and conduct such a review or, in the first instance, to order the Special Term to inspect or investigate the ballots or to order the custodian of the ballots to produce them before the Special Term, nor can the provisions of section 374 be made the basis of such an order where the proceeding was expressly and concededly commenced, and from the beginning has been opposed, under section 381.

5. The order of the Appellate Division is one of modification (Code Civ. Pro. § 190, subd. 1) and also institutes a proceeding distinct, independent and involving no further or future order; hence, an appeal may, of right, be taken to this court.

Matter of Whitman, 185 App. Div. 571, reversed.

(Argued December 4, 1918; decided December 10, 1918.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 29, 1918, which modified and affirmed as modified an order of Special Term granting a motion for a recanvass and a judicial review of ballots cast at the general election, held November 5, 1918, for the office of governor in a proceeding instituted under section 381 of the Election Law.

The facts, so far as material, are stated in the opinion.

Abram I. Elkus, James A. Foley, John Godfrey Saxe and Joseph M. Proskauer for appellant. The Appellate Division has wholly misconceived the power and duty

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of the courts to review the action of election officials. (Const. of N. Y. art. II, § 6; *Hearst v. Woelper*, 183 N. Y. 274; *Metz v. Maddox*, 189 N. Y. 460; *Tamney v. Atkins*, 209 N. Y. 202; 2 High on Injunctions [4th ed.], § 1312; Code Civ. Pro. §§ 1983, 1948; *Matter of Holle*, 160 App. Div. 369.) The moving papers are wholly deficient to sustain the issuance of a writ of mandamus. The only allegation of possibly material fact as to the void, blank and protested ballots is on information and belief with no statement of source of information or ground of belief. (*People ex rel. Karns v. Potter*, 176 App. Div. 330; *People ex rel. Brown v. Freisch*, 215 N. Y. 356; Saxe's Manual of Elections [Ed. of 1918], 227; *People ex rel. Watkins v. Board of Canvassers*, 25 Misc. Rep. 444; *Matter of Ordway*, 118 App. Div. 386; *People ex rel. McLoughlin v. Ammerwerth*, 197 N. Y. 340; 2 Fiero on Special Proceedings [3d ed.], 1177, 1444; *People ex rel. O'Brien v. Kruger*, 12 App. Div. 536; *People ex rel. Corrigan v. Mayor, etc.*, 149 N. Y. 223.) There is no proof whatever of any injury to the relator requiring remedy by issuance of a writ of mandamus. (*People ex rel. Perry v. Bd. of Canvassers*, 88 App. Div. 185; 2 Fiero on Special Proceedings [3d ed.], 1356; *People ex rel. Larkin v. Palmer*, 27 Misc. Rep. 569; *Matter of Coughlin*, 198 N. Y. 613; 137 App. Div. 283.)

A. S. Gilbert and Emil E. Fuchs for respondent. The order appealed from is not reviewable by this court. It is not a final order. If it be a final order it unanimously affirmed the order made at Special Term without modification within the meaning of section 191 of the Code of Civil Procedure. (*People ex rel. Feeny v. Board of Canvassers*, 156 N. Y. 36.)

COLLIN, J. Charles S. Whitman, the respondent, instituted this proceeding by presenting, under an order to show cause, to the Special Term of the Supreme Court

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on November 25, 1918, an affidavit made by him. It stated, in effect: He was the candidate of the Republican party for the office of governor of this state at the general election of November 5, 1918; Alfred E. Smith was the candidate of the Democratic party for that office and other named persons were the like candidates of other named parties. In pursuance of the provisions of the Election Law inspectors of election in the various election districts in the county of Richmond made and filed statements of the results. It proceeded:

“ That, as more particularly appears from the original statements of the result of the canvass filed by the Inspectors of Elections in the various Election Districts in the County above named with the Clerk of said County, certain of the ballots counted by such Inspectors were protested, or were canvassed as wholly blank or void. That a detailed statement of the number of such ballots protested or declared to be wholly blank or void as returned by said Inspectors, and as more fully appears from the original of said return on file in the office of the Clerk of the County above named, is set forth on Schedule A, hereto annexed, which is hereby made a part of this application as if here in full set forth. That deponent is informed and believes that a number of said ballots declared void were so declared because voters made their marks in the voting spaces opposite both the Republican and Prohibition emblems, and were valid. It is impossible for deponent to give any more definite information on this subject, because he has not yet succeeded, owing to the opposition by Alfred E. Smith, in examining said ballots under Section 374 of the Election Law, and it will be impossible to have such examination and make this application in the time required by statute.”

It stated further in effect: The result of the election, as certified by the various inspectors of election, is about

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to be, or has been, or is in the process of being canvassed by the county canvassers in pursuance to the provisions of the Election Law and in order that their certificate shall be correct it is necessary that a judicial review of the ballots returned as wholly blank, protested and void be had under section 381 of the Election Law. It proceeded: "*Wherefore*, your deponent prays that a writ of mandamus issue pursuant to the provisions of Section 381 of the Election Law, requiring the Board of County Canvassers of the County above named to recanvass the said ballots returned as wholly blank, void or protested. That in order that a proper writ issue this Court direct the said ballots returned as wholly blank, void and protested to be brought before this Court and judicially passed upon. That the peremptory writ of mandamus thereupon issue in proper form directing the Board of County Canvassers to deduct from the total any ballots counted for any candidate for Governor which shall be found to be void and adding to said total any ballots cast for any candidate for Governor declared to be void by the Inspectors of Election, but found by this Court to be valid ballots, and likewise adding to the total any ballot cast for any candidate held by the Inspectors to be wholly blank which this Court shall find to have been a legal ballot cast for any candidate for Governor."

Schedule A annexed to it stated the number of void and the number of blank ballots in each election district in the county of Richmond. The aggregate number of the former was one hundred and seventy and of the latter two hundred and fifty-eight.

The application so made was opposed by the argument of counsel. The Special Term ordered: "That the said motion be, and the same hereby is granted, and it is further ordered, that the application of Alfred E. Smith to vacate the stay contained in said order against the

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Board of County Canvassers of the County of Richmond be denied; and it is further ordered, that the canvass applied for by the said Charles S. Whitman be begun before this Court at 10 A. M. on November 26th, 1918."

Upon the appeal of Alfred E. Smith, the Appellate Division made the order: "The order of the Special Term of the Supreme Court, held in and for the County of Richmond, at the Court House at St. George, Staten Island, N. Y., on the 25th day of November, 1918, and granted on said day, is hereby modified so as to read as follows: Ordered, that the said motion of Charles S. Whitman for a judicial review of the ballots cast be granted, and it is further ordered, that the Clerk of the County of Richmond produce the packages containing the protested, void and blank ballots at the special term of the Supreme Court for Richmond County at 10 A. M. on Monday, December 2, 1918, where these proceedings are pending. That upon the result of such judicial review a writ of mandamus may issue to the County Canvassers as the Special Term may direct. Upon consent of applicant's counsel in open court, the present stay against the County Canvassers is vacated without prejudice to any further application therefor, should it become necessary. And as thus modified the order appealed from is affirmed, without costs. For the purpose of this proceeding, Mr. Justice FAWCETT is hereby assigned to the Special Term of Richmond County from and after December 2nd, 1918, at 10 A. M., until such proceedings shall be completed."

Section 381 of the Election Law (Cons. Laws, chapter 17) is: "Judicial Investigation of Ballots. If any statement of the result of the canvass in an election district shall show that any of the ballots counted at an election therein were protested or were canvassed as wholly blank or void, a writ of mandamus may, upon the application of any candidate voted for at such election in such

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district, within twenty days thereafter, issue out of the supreme court to the board or body of canvassers, if any, of the return of the inspectors of such election district, and otherwise to the inspectors of election making such statement, requiring a re-canvass of such ballots. If the court shall, in the proceedings upon such writ, determine that any such ballot was improperly canvassed, it shall order the error to be corrected. Boards of inspectors of election districts, and boards of canvassers, shall continue in office for the purpose of such proceedings."

Its purpose and scope are not obscure or doubtful. The courts must adhere to and cannot enlarge them. (*Matter of Tamney v. Atkins*, 209 N. Y. 202.) In no class of litigations is a strict and impartial adherence to the established rules of procedure and legal principles more essential or conservative of public quietude and respect for law than in the class in which is the case at the bar. The electors of the several parties and their candidates are justly and wisely sensitive to any departure of the courts from such adherence. The section empowers the court, under the requisite allegations in behalf of a candidate voted for at an election, and sufficient proofs, to require through a writ of mandamus the board of canvassers of the return of the inspectors of election to re-canvass, and correct the errors in the original canvass of, the protested or the void or the blank ballots.

The writ of mandamus authorized by section 381 is the ordinary writ. (*People ex rel. Hasbrouck v. Supervisors, Dutchess Co.*, 135 N. Y. 522; *People ex rel. Bantel v. Morgan*, 20 App. Div. 48; *People ex rel. Perry v. Board of Canvassers, Sullivan Co.*, 88 App. Div. 185.) The legislature did not, by the language of the section, invest it with unique or extraordinary characteristics. The ordinary and established rules and procedure, statutory, at common law and judicial, authorizing and regulating the issuance of a writ of mandamus are applicable to it.

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There is no provision of the section 381 or of the Election Law inconsistent with such conclusion. In enacting the section, the legislature did not intend or contemplate, and the section does not enact, that the candidate, through his mere expressed wish, can move the court to act as a supervising or appellate canvasser of the protested, void or blank ballots, or to enter upon a judicial investigation of those ballots in order to ascertain, for any use or end, what result would ensue. The court can be moved only by allegations of the nature and quality essential, under the settled rules, on the part of an applicant for the issuance of the writ of mandamus as provided by the common law or by the Code of Civil Procedure. (Sections 2067-2090.)

It is neither necessary nor useful to attempt to state those rules. They are known to the counsel at the bar. A fundamental rule is that an applicant for the writ of mandamus must, by written and verified allegations, present to the court facts which, if true and unavoids by the defensive facts, prove that he is under a grievance or injury which the writ would remedy and that he is entitled to that remedy. A writ of mandamus issues only where a clear legal right is made to appear. (*People ex rel. McMackin v. Board of Police, N. Y. City*, 107 N. Y. 235; *People ex rel. Stevens v. Hayt*, 66 N. Y. 606.) The function of the courts is to determine actual controversies between litigants. The law is practical and has as its purpose to adjudge, through just and general principles and precedents, investing it with certitude and continuity, the actual disputes growing out of the conduct and transactions of those under its jurisdiction. (*Matter of Resolution State Industrial Commission*, 224 N. Y. 13; *Blanchard v. Blanchard*, 201 N. Y. 134.) A suitor to the courts must present a grievance in the contemplation of the law and the facts from which it arises. Another established rule is that the averments presenting those

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facts and essential to the issuance of the peremptory writ of mandamus cannot be upon the mere information and belief of the affiant. Our present chief judge, while Justice Hiscock, in a proceeding like unto this at bar, well said: "The entire tendency of the courts is to require in affidavits which are to be made the basis of important orders and remedies the same kind of direct and legal statements of facts which would be required from a witness upon the stand, or where that cannot be had and statements based upon hearsay must be resorted to, a fortification of those statements by a clear recital of the information upon which they are based," and applied the rule to the case before him. (*People ex rel. Watkins v. Board of Canvassers, Oneida Co.*, 25 Misc. Rep. 444, 448.) This is in accord with our decisions. (*Buell v. Van Camp*, 119 N. Y. 160; *People ex rel. Frost v. N. Y. C. & H. R. R. R. Co.*, 168 N. Y. 187.) We must, therefore, give no heed to statements of the affidavit of Mr. Whitman made upon mere information and belief.

The affidavit, obviously, did not empower the court to grant the order directing the issuance of the writ of mandamus. A detailed analysis of its contents and the expressed application to them of the rules we have stated are unnecessary. The affiant did not aver that the inspectors of elections made an error or omitted any duty. The court was bound, on and for the purpose of the application, to presume that everything was rightfully done by them until some evidence was produced to show the contrary. The general presumption is that an official does no act contrary to his official duty, or omits no act which his official duty requires. (*Matter of Marcellus*, 165 N. Y. 70.) From the facts stated in the affidavit, no grievance nor injury to Mr. Whitman arises, there is no wrong shown and, therefore, none to be remedied and no subject-matter upon which the writ

could operate. Section 381 authorizes exclusively the application for the writ, and the order for and its issuance in accordance with the established rules relating to that remedy. It does not contain any provision empowering the court to order the custodian of the protested, void or blank ballots to produce those ballots to the court for any purpose. And the court cannot by the effect of any of its provisions direct the production of them. If, in the course of the proceedings upon the application for the writ of mandamus under section 381, the production and inspection or investigation of those ballots is deemed by the trial court, or Special Term, aidful or desirable, it can by its order secure those results by virtue of the provision, as follows, of section 437: "The packages of protested, void and wholly blank ballots shall be retained inviolate in the office in which they are filed subject to the order and examination of a court of competent jurisdiction, or to examination by a committee of the Senate or Assembly to investigate and report on a contested election of member of the Legislature where such ballots were cast at such election, and may be destroyed at the end of six months from the time of the completion of such canvass, unless otherwise ordered by a court of competent jurisdiction or unless such committee examination be pending." It is manifest that the words of section 381, "In the proceedings upon such writ," are the equivalent of the words, "in the proceedings upon the application for such writ." It follows from what we have written that the order of the Special Term was erroneously granted. It should have dismissed the proceeding.

We turn now to the order of the Appellate Division. In section 381 there is not the authorization to that court for any one of the provisions or directions of that order. The section authorizes the application for, under proper verified averments, and the

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issuance of the writ of mandamus, upon adequate proofs, under facts and a condition expressed by it and which at common law do not warrant the application or issuance. No provision of it empowers the Appellate Division to institute or order, as a proceeding, "a judicial review of the ballots cast," or to order the Special Term to enter upon and conduct such a review or, in the first instance, to order the Special Term to inspect or investigate the ballots or to order the custodian of the ballots to produce them before the Special Term. The proceeding presented to the Appellate Division is converted by its order into a proceeding independent of and unrelated to that provided by section 381. In truth and in fact the order institutes a new proceeding which is wholly without the authorization of that section, and as we have said, independent of and unrelated to the proceeding it provides. Neither the title in the order nor the intention of the court can destroy the reality. We must take cognizance of that which actually exists and must, therefore, regard and hold the order to institute a new and distinct special proceeding. To do otherwise would sanction the injustice of disregarding that which is substantial and actual and of being controlled by mere nomenclature and form.

Certain of my brethren, who concur in this opinion, hold the view that a provision of section 374 may be the basis of the order of the Appellate Division. The provision is: "Any candidate shall be entitled as of right to an examination in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate; but the court shall prescribe such conditions as of notice to other candidates or otherwise as it shall deem necessary and proper." While the order, certainly, affords the relief or remedy thus provided, and which Mr. Whitman stated in his affidavit he had not yet succeeded in securing, we do not consider or determine

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whether or not such view is correct, because the proceeding was expressly and concededly commenced, and from the beginning has been opposed, under section 381. The law does not permit a party or the court to abandon, for another, the theory upon which a proceeding or an action has been commenced and prosecuted. (*Racine v. Morris*, 201 N. Y. 240; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178.)

The respondent urges that the appeal to this court from the order will not lie, and for the two reasons: the order was unanimously made; it is not a final order. The first reason is answered by the fact that the order is one of modification and is within subdivision 1 of section 190 of the Code of Civil Procedure. The second reason is covered by the fact that the order instituted a proceeding distinct, independent and involving no further or future order.

The order of the Appellate Division and that of the Special Term should be reversed and the proceeding dismissed, without costs.

CRANE, J. The relator applied to the Supreme Court for a writ of mandamus directing a recanvass of void and blank ballots in certain election districts of Richmond county. An application was made under section 381 of the Election Law. After a hearing the motion was granted and a recanvass of these ballots directed. The Appellate Division modified the order granting the writ and allowed the relator to inspect the ballots and nothing more. If it should appear that they were erroneously disposed of then it was ordered that a mandamus might issue. It is claimed here that the Appellate Division had no power given it by the Election Law to make such an order and that the mandamus in the first instance granted by the Special Term was improper as not based upon sufficient facts.

There are two remedies granted by the Election Law, sections 374 and 381. Section 374 authorizes the examination of ballots, but does not provide any remedy in case the ballots are defective or improperly voted and counted. This section came from the Election Law of 1896, chap. 909, section 111. It referred only to the ballots contained in the sealed ballot boxes and read:

"They shall be preserved inviolate for six months after such election and may be opened and their contents examined upon the order of the supreme court or a justice thereof, or a county judge of such county. * * *

The Consolidated Laws (Laws of 1909, chapter 22) contained the same provision which applied only to the ballots securely locked and sealed in the ballot box. By chapter 821 of the Laws of 1913, section 374 was amended by adding thereto a separate and distinct clause. It continued the provision already existing in the law as above stated, reading as follows:

"The boxes and packages so deposited shall be preserved inviolate for six months after the election, except that they may be opened and their contents examined upon the order of any court of competent jurisdiction," and extended the right of examination in these words:

"Any candidate shall be entitled as of right to an examination in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate; but the court shall prescribe such conditions as of notice to other candidates or otherwise as it shall deem necessary and proper."

This examination as of right applies to all ballots, those in the box as well as the protested, void or blank ballots.

Not only is this the plain reading of the provision but the change in the title of the section indicates that all ballots voted on election day were intended to be included in this quoted sentence.

Section 374, as found in the Consolidated Laws, is headed, "Preservation of Ballots not Void or Protested." Nothing is said in the section about keeping the protested ballots. The amendment of the section made in 1913 commenced with these words: "Preservation of ballots." It provides how the ballots voted shall be securely locked and sealed in boxes. It further provides: "The protested, void and wholly blank ballots shall be preserved as provided in section 437 of this chapter." After these words follows the sentence above quoted that *any* ballot may be examined as of right. It is quite clear to my mind that this amendment of 1913 applied both to the ballots in the sealed boxes and to the protested, void or blank ballots.

Prior to the amendment of 1913 it was decided by this court that the provisions in the then existing law giving power to the courts to open the ballot boxes and examine the ballots was only to be used in judicial proceedings pending or about to be commenced. (*People ex rel. Brink v. Way*, 179 N. Y. 174; *Matter of Hearst v. Woelper*, 183 N. Y. 274; *People ex rel. Brown v. Freisch*, 215 N. Y. 356.)

This limitation no longer applies to the amendment of 1913. The examination is given as of right to a candidate whose name appears upon the ballot. (*Matter of Quinn*, 220 N. Y. 623.)

If this relator had applied for an examination of the ballots under section 374 of the Election Law as it now reads I am of the opinion that his papers were sufficient to have justified an order permitting such inspection.

His application, however, was made for a mandamus under section 381 of the Election Law. He is not entitled to the mandamus as a matter of right. This section applies only to the protested, void or blank ballots. It says that a mandamus *may* issue requiring the election inspectors to recanvass these ballots. The

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facts, must, therefore, be set forth in the moving papers justifying the court in directing that mandamus issue. It is not sufficient to show merely that such ballots existed. It should appear that they have been improperly classified or counted. The general practice in applications for mandamus must be complied with and if facts are not stated upon knowledge but upon information and belief the sources of that information must be given. The papers in this case are defective in that the reason for the mandamus is stated upon information and no sources of information are set forth. The relator says that he believes that ballots marked opposite his name in two columns have been set aside as void or blank ballots. If this be so the relator would be entitled to a mandamus under section 381 (*People ex rel. Feeny v. Board of Canvassers, Richmond Co.*, 156 N. Y. 36) but the mere statement of his belief that such is the fact is insufficient. (*Buell v. Van Camp*, 119 N. Y. 160-165.)

The Appellate Division would, therefore, have been justified in reversing the order of the Special Term, but this it did not do. It made an order in a proceeding under section 381 for an examination of the ballots. No such right is given by this section. The order for the examination could have been made upon these papers, as I have above stated, under section 374, but no such application was made. This is a special proceeding allowing a recanvass. The relator has not applied for an examination under section 374, but believing that he had facts sufficient immediately applied for the mandamus.

It may be said that as he could have had an examination under section 374 upon these papers there is no harm in the order of the Appellate Division granting it to him although he has not asked for it. The answer is that in election matters the courts have no power to interfere with the count except as that power is conferred by statute, and then the statute must be carefully followed.

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Here the statute allowed a mandamus to recanvass the votes and the relator has sought that remedy. He must fail because of the insufficiency of his papers. No authority is given for an order of examination in such special proceeding. The relator has not asked for an examination and inspection under the other provision of the law and the two should be kept separate and distinct. Under section 374 an examination only is permitted and no remedy provided for a recount as in section 381.

The order appealed from is, in my opinion, a final order. It authorizes an inspection and an examination of the ballots, as if the application were under section 374 of the Election Law.

For the reasons above stated the order appealed from should be reversed.

McLAUGHLIN, J. (dissenting). I am unable to concur with the majority of the court that the order appealed from should be reversed. The order is not a final one. It does not finally determine the special proceeding in which it was made. Therefore, this court has no jurisdiction to hear the appeal. (Code of Civ. Pro. sec. 190, subd. 1.) That it is not a final order seems to me clear when the provisions of the order and the statute under which the proceeding was instituted (Sec. 381 of the Election Law, as amended by chap. 821 of the Laws of 1913) are considered. This section reads as follows: "Judicial investigation of ballots. If any statement of the result of the canvass in an election district shall show that any of the ballots counted at an election therein were protested or were canvassed as wholly blank or void, a writ of mandamus may, upon the application of any candidate voted for at such election in such district, within twenty days thereafter, issue out of the supreme court to the board or body of canvassers, if any,

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of the return of the inspectors of such election district, and otherwise to the inspectors of election making such statement, requiring a recanvass of such ballots. If the court shall, in the proceedings upon such writ, determine that any such ballot was improperly canvassed, it shall order the error to be corrected. Boards of inspectors of election districts, and boards of canvassers, shall continue in office for the purpose of such proceedings."

The respondent was a candidate for governor of the state of New York at the general election held on November 5, 1918. He presented a petition showing that fact; that original statements of the result of the canvass filed by the inspectors of election in the various election districts in the county of Richmond with the clerk of that county showed certain of the ballots counted by such inspectors were protested or canvassed as wholly blank or void; that a detailed statement thereof was set forth in a schedule attached to the petition; and asked that a writ of mandamus issue under the section of the Election Law quoted, requiring the board of canvassers to recanvass said ballots returned as wholly blank, void or protested; and in order that such writ might issue, the court order such ballots be brought before it and judicially passed upon.

Upon this petition the other candidates for governor and the board of canvassers of Richmond county were ordered to show cause at a Special Term of the Supreme Court, at a time and place named, in Richmond county, why a writ of mandamus should not issue out of the court directing the board of canvassers of Richmond county to recanvass all such ballots returned by such inspectors as being wholly blank, void or protested, and why the court should not, for the purpose of issuing such mandamus, judicially review all such ballots as required by section 381 of the Election Law; and that the clerk

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of Richmond county produce before the court, for judicial examination, on the return of the order, all said packages of void, protested and wholly blank ballots filed with him.

Upon the return of the order to show cause the relief asked for by the petitioner was granted. An appeal was then taken by the appellant, who was also a candidate for governor at the same election, to the Appellate Division, second department, which modified the order so that it should read as follows:

“ Ordered, that the said motion of Charles S. Whitman for a judicial review of the ballots cast be granted, and it is further

“ Ordered, that the Clerk of the County of Richmond produce the packages containing the protested, void and blank ballots at the Special Term of the Supreme Court for Richmond County at 10 A. M. on Monday, December 2, 1918, where these proceedings are pending. That upon the result of such judicial review a writ of mandamus may issue to the County Canvassers as the Special Term may direct.” Application was made for permission to appeal to this court, which was denied, and the present appeal then taken.

This is a special proceeding instituted for the sole purpose of obtaining a judicial review of the protested, void and wholly blank ballots, to the end that if errors be discovered, the canvassers of Richmond county may be directed to correct same. The order appealed from is in the nature of a subpoena *duces tecum* requiring the clerk to produce the ballots in order that the court may determine whether the inspectors of election properly canvassed such votes. When the sealed packages containing these ballots are produced by the clerk in obedience to this order, they will be opened in the presence of the court and it will then determine whether errors have been made and if so an order will be made directing that

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a mandamus issue, directed not to the clerk of Richmond county, but to the canvassers thereof, that they recanvass these ballots and correct the error which has been made. If errors be not discovered, then the application for the writ will be denied. Such order, either granting or denying the writ, is the final one in this proceeding, since it terminates it.

A majority of the court, however, is of the opinion this is a final order under section 374 of the Election Law. This view, it seems to me, is erroneous and in effect this court has so held. (*Matter of Smith v. Wenzel*, 216 N. Y. 421.) Section 374 deals not with the recanvass or recount of any ballots. It relates only to their preservation, and inspection by a candidate. (*People ex rel. Brown v. Freisch*, 215 N. Y. 356.) It provides that after the last tally sheet and returns are completed and all stubs and ballots, *except the protested, void and wholly blank ballots*, are replaced in the boxes from which they were taken, each box shall be securely locked and sealed and deposited by an inspector designated for that purpose with the officer or board furnishing it, together with the separate sealed packages of unused official ballots. The protested, void and wholly blank ballots are never put into the boxes mentioned in section 374. They are put into a sealed package by themselves (Section 369) and are required to be preserved as provided in section 437.

It is true that section 374 provides that any candidate shall be entitled as of right to an examination in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate. But this application is not for an inspection of the ballots in the boxes which have been "securely locked and sealed." It is for a recount or recanvass by the court of the "protested, void and wholly blank ballots" put by themselves in a sealed package and delivered to the county clerk.

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The object sought to be accomplished by the examination provided for in section 374 is to preserve evidence for use in an action in the nature of quo warranto to try title to public office and "thereby to sustain the underlying principle of the Election Law which prevents the courts from reviewing the ministerial work of inspectors and canvassers in counting and canvassing votes." (*Matter of Smith v. Wenzel*, *supra*, p. 425.) No recount or recanvass is provided for or permitted.

Section 381 provides not for an inspection, but for a recount and recanvass by the court of the protested, void and wholly blank ballots. (*People ex rel. Brown v. Freisch*, *supra*.) It is a proceeding for the correction of error in the election district statement. This court so held in *Matter of Smith v. Wenzel* (*supra*, p. 425) and *People ex rel. Brown v. Freisch* (*supra*). The authority given to the court is limited to a review of the protested, void and blank ballots returned by the election officers in the sealed packages. The court has no power to command a recount of all the ballots. (*People ex rel. McLaughlin v. Ammenwerth*, 197 N. Y. 340.) Its power is limited to a recount of (1) protested ballots; (2) void ballots, and (3) blank ballots. The order appealed from is but a step in the proceeding instituted for the purpose of procuring a recount of such ballots. There cannot be a final order in the proceeding until after the clerk produces these ballots and they have been recounted by the court.

The appeal, therefore, should be dismissed. This view renders it unnecessary to pass upon the other questions discussed in the prevailing opinion.

CHASE, CUDDEBACK and HOGAN, JJ., concur with COLLIN, J.; CRANE, J., concurs in opinion; HISCOCK, Ch. J., and McLAUGHLIN, J., dissent and vote to dismiss the appeal on opinion by McLAUGHLIN, J., in which HISCOCK, Ch. J., concurs.

Orders reversed and proceedings dismissed.

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In the Matter of the Application of CHARLES S. WHITMAN, Appellant, for an Examination of Ballots, under Section 374 of the Election Law.

ALFRED E. SMITH, Respondent.

Elections — order that examination of ballots, upon application under section 374 of Election Law, shall take place after completion of canvass, proper.

Upon an application, under section 374 of the Election Law (Cons. Laws, ch. 17), for an order permitting examination of ballots cast at a general election and fixing the time therefor, the court may properly consider facts relating to the canvass of the vote and determine that it is proper, under the circumstances, that the examination should not take place until after the canvass of all votes is completed.

Matter of Whitman, 185 App. Div. 228, affirmed.

(Argued December 6, 1918; decided December 10, 1918.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 3, 1918, which affirmed an order of Special Term granting a motion for an order permitting examination of ballots cast for the office of governor in the counties of New York and Bronx at the general election held November 5, 1918.

The facts, so far as material, are stated in the opinion.

A. S. Gilbert, Herbert R. Limburg and Emil E. Fuchs for appellant. The applicant is entitled to examine the ballots forthwith as a matter of right. There was no power in the court to postpone the examination until after the issuance of the certificate of election. (*Matter of Quinn*, 220 N. Y. 623; *Matter of Rush*, 101 Misc. Rep. 261.)

Abram I. Elkus, James A. Foley, Edgar M. Cullen, John Godfrey Saxe and Joseph M. Proskauer for respondent.

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CRANE, J. This is an application pursuant to section 374 of the Election Law (Cons. Laws, ch. 17) to examine the ballots in the last election cast for governor in the counties of New York and Bronx. Upon the return of an order to show cause and the submission of opposing affidavits an order was made at the Special Term on the 20th day of November, 1918, authorizing the applicant, Charles S. Whitman, to examine all the ballots for said counties upon which his name appeared as a candidate for governor, including the void, protested or defective ballots and the stubs thereof. Among other conditions it was provided that the examination be made in the office of the board of elections in the city of New York or at such other place as the board might designate, and that the examination should commence at nine o'clock on the day following the issuance of the certificate of election as governor by the secretary of state as provided by section 443 of the Election Law and continue thereafter daily without intermission so far as possible to the end that such examination be completed at the earliest possible moment.

Both the applicant and Alfred E. Smith, the opposing party, having appealed to the Appellate Division the order was affirmed by a divided court. Appeal to this court has been taken by Charles S. Whitman, the said Smith not having carried his appeal beyond the Appellate Division. No question, therefore, arises as to whether or not upon the papers presented the application for the examination should have been granted. The only question presented by the applicant appealing pertains to that part of the order fixing the time for the examination on the day following the issuance of the certificate of election by the secretary of state. It is stated in the moving papers dated November 11th, 1918, that the official canvass will not be completed for some six weeks. The order, it is claimed, should have directed the examina-

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tion and inspection to have been made immediately or forthwith, and that the court had no power to delay it for six weeks or until the certificate of election has been issued.

If a discretion were given to the Special Term to fix the time of the examination, this court cannot review the order unless there be an abuse of power. (*Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. R. Co.*, 197 N. Y. 391; *People ex rel. Flynn v. Woods*, 218 N. Y. 124.)

The provisions of section 374 under which this application was made are:

"Any candidate shall be entitled as of right to an examination in person or by authorized agents of any ballots upon which his name lawfully appeared as that of a candidate; but the court shall prescribe such conditions as of notice to other candidates or otherwise as it shall deem necessary and proper."

As to notice to the candidate, an order was presented by the applicant and granted requiring Alfred E. Smith to show cause why Charles S. Whitman should not examine the ballots cast at the general election and why an order should not be made providing *for the time* when and the manner in which such examination should be had.

Leaving aside all other considerations, the court upon this application could have taken into consideration the fact that the soldier vote had not yet been canvassed. Article XV of the Election Law, as amended by chapter 298 of the Laws of 1918, makes full provision for taking the vote of the soldiers and sailors of this state serving the nation in various parts of the country. After these votes have been received in the various commands, where the soldiers or sailors are stationed, it is provided that they shall be forwarded in envelopes to the secretary of state at Albany who, in turn upon proper notice, forwards them to the boards of election in each county, according to the residence of the voter. It is then

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enacted by subdivision 6 of section 513 that the board of inspectors in each election district, where the soldier and sailor vote is to be canvassed, shall convene for that purpose at ten o'clock in the forenoon on the sixth Tuesday after election. This year the sixth Tuesday falls on the seventeenth of December.

Considering the number of soldiers and sailors that New York state has furnished in this war, many of whom are now at the various encampments, it is impossible to say what the effect of this vote will have upon the result of the gubernatorial election. It is stated in the record on this appeal that the present margin between the opposing candidates is about 7,000 votes. It may be that when the soldier and sailor vote is counted, the purpose for which this order has been obtained may no longer exist.

The result, in any event, may be so conclusive as to avoid the necessity or desire for a further examination of any ballots. Whether this be so or not, the fact remains that the judge, to whom this application was made, could very justly have considered these matters, and have determined that it was proper, under the circumstances, that the examination should not take place until after the canvass of all votes had been completed.

Furthermore, the appellant fails to disclose any injustice that will be done him or any rights which will be lost or impaired by waiting until the time appointed.

It follows, therefore, that the order appealed from must be affirmed, without costs.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and McLAUGHLIN, JJ., concur.

Order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JOHN
H. PRICE, Respondent, *v.* SHEFFIELD FARMS-SLAWSON-
DECKER COMPANY, Appellant.

Labor Law — provision prohibiting employment of children under the age of fourteen years — employer equally liable whether child is employed by himself or his agents — must employ reasonable supervision to prevent violation of statute — legislature had power to make violation of statute a criminal offense and provide for punishment by fine.

1. The Labor Law (Cons. Laws, ch. 31), standing by itself, is not a criminal statute, but a separate statute (Penal Law, § 1275) supplements its mandates and prohibitions by attaching penal consequences. These do not of necessity affect the meaning that the Labor Law would have without them; the scope of the duty is one problem; the extent to which the breach may be visited with punishment another.

2. Section 162 of the Labor Law prohibiting the employment in or in connection with mercantile establishments of children under the age of fourteen years is directed primarily against the employer, and only secondarily against others as they may aid and abet him. He must neither create nor suffer in his business the prohibited conditions. He may not escape the duty by delegating it to others. He breaks the command of the statute if he employs the child himself and he breaks it equally if the child is employed by agents to whom he has delegated his own power to prevent. And what is true of employment is true of the sufferance of employment. The statute makes no distinction between sufferance and permission.

3. Any act or omission that will charge an employer with a breach of section 162 of the Labor Law becomes by force of section 1275 of the Penal Law a breach of that statute as well. There was power in the Legislature to impose this stringent penalty and to punish offenders by fines moderate in amount, but in sustaining the power to fine this court is not to be understood as sustaining to a like length the power to imprison. The statute is not void as a whole though some of its penalties may be excessive. The good is to be severed from the bad and the valid penalties remain.

4. Where upon the trial of an information charging a violation of section 162 of the Labor Law there is some evidence of the defendant's negligence in failing for six months to discover and prevent the employment of a child under the age of fourteen years, the omission

to discover and prevent was a sufferance of the work and for the resulting violation of the statute a fine was properly imposed.

People ex rel. Price v. Sheffield Farms, etc., Co., 180 App. Div. 615, affirmed.

(Argued November 18, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 14, 1917, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting defendant of a violation of section 162 of the Labor Law.

The facts, so far as material, are stated in the opinion.

George W. Alger for appellant. There was no evidence before the court to justify a conviction, there being an utter absence of proof that defendant employed or permitted this child to work for it. (*People v. Taylor*, 192 N. Y. 398; *Gregory v. United States*, 17 Blatch. 325; *Lancaster v. Commonwealth*, 149 Ky. 443; *Loosey v. Orser*, 4 Bosw. 391; *Chicago v. Sterns*, 105 Ill. 555; *People v. Werner*, 174 N. Y. 132; *Rose v. Balfe*, 223 N. Y. 481; *Reilly v. Connable*, 214 N. Y. 586; *Collins v. Butler*, 179 N. Y. 156; *O'Brien v. Stern Bros.*, 223 N. Y. 290; *Labatt Master & Servant* [2d ed.], § 2252; *Driscoll v. Scanlon*, 165 Mass. 348.) The construction of the statute as one imposing upon the defendant as the owner and proprietor of a business the absolute duty, which it is bound to perform at its peril, of preventing the employment by its employees of children, without its knowledge or consent, is unjustified and erroneous. (*T. H. Dept. v. McDevitt*, 215 N. Y. 160; *People v. Werner*, 174 N. Y. 132; *People v. West*, 106 N. Y. 283; *People v. D'Antonio*, 150 App. Div. 109; *People v. Roby*, 52 Mich. 577.)

Edward Swann, District Attorney (Robert S. Johnstone of counsel), for respondent. The facts proved establish the defendant's liability under the statute. (*American*

Car Co. v. Armentraut, 214 Ill. 509; *Inland Steel Co. v. Yedinak*, 172 Ind. 423; *Purtell v. P. & R. C. & I. Co.*, 256 Ill. 110; *Ten. House Dept. v. McDevitt*, 215 N. Y. 160; *Comm. v. N. Y. C. & H. R. R. Co.*, 202 Mass. 394; *People v. Werner*, 174 N. Y. 132; *C., B. & Q. Ry. v. United States*, 220 U. S. 559; *Ford v. State*, 37 Atl. Rep. 172; *Reg. v. Tolson*, 23 Q. B. Div. 168; 3 Greenl. on Ev. § 21; *People v. Taylor*, 192 N. Y. 398.) The legislature may impose upon a person or corporation engaged in a business an absolute liability without reference to the common-law doctrine of *respondeat superior* or other common-law doctrines, and without fault or negligence. (*New York Central R. R. Co. v. White*, 243 U. S. 188; *Bowersock v. Smith*, 243 U. S. 29; *Hawkins v. Bleakly*, 243 U. S. 210; *Matter of Heitz v. Ruppert*, 218 N. Y. 148.)

CARDOZO, J. [The defendant, a corporation, has been convicted of violating section 162 of the Labor Law (Consol. Laws, chap. 31). That section provides that "no child under the age of fourteen years shall be employed or permitted to work in or in connection with any mercantile * * * establishment specified in the preceding section." Violation of the Labor Law is a misdemeanor, and is punishable, if a first offense, by a fine of not less than twenty nor more than fifty dollars (Penal Law, sec. 1275).] Heavier fines and even imprisonment may follow a repetition of the offense (Penal Law, sec. 1275). In this case the fine imposed was \$20. The question is whether there is any evidence of guilt.

[The defendant is engaged in the sale of milk. It employs one hundred and twenty-five drivers to make deliveries to its customers. In February, 1917, one of the state's inspectors found a boy of thirteen years assisting in a driver's work. The driver, one Schmidt, employed the boy and paid him. Schmidt's purpose

seems to have been to prevent the theft of milk bottles, and thus to benefit the defendant, whose practice had been to stand the loss from thefts itself. None the less, ✓ he knew that his conduct, whether helpful to the defendant or not, was forbidden by its rules. The rule was that drivers, under pain of dismissal, were not to allow any person not in the employ of the company to assist them in any way or to ride on their wagons. But the defendant's duty did not end with the mere promulgation of a rule (*Larkin v. N. Y. Tel. Co.*, 220 N. Y. 27, 32). There was some duty of enforcement. The defendant was not blind to the fact that the rule was often broken. Word had often come to it before that some of its drivers were employing boys to help them. It sent out its inspectors "may be once a week or a month" to discover and report delinquents. Offenders discovered had been reprimanded, but not discharged. One driver, who had been prosecuted by the People, was still, though convicted, in the defendant's service. For six months the boy employed by Schmidt had been doing the same work. The inference is permissible that there was no adequate system either of repression or of detection. We must say whether on such facts a fine may lawfully be imposed.]

There are two statutes to be construed: the Labor Law, which imposes the duty, and the Penal Law, which attaches the penalty. The Labor Law, standing by itself, is not a criminal statute. The purpose of most of its provisions is not penal, but remedial. But a separate statute (Penal Law, sec. 1275) supplements its mandates and prohibitions by attaching penal consequences. For many years, they were attached to the violation of certain enumerated provisions and those only (Penal Code, sec. 384-1, added by L. 1897, ch. 416, sec. 3, and amended by L. 1903, ch. 380, sec. 1; L. 1907, ch. 506, sec. 2; Penal Law, sec. 1275, as enacted by L. 1909, ch. 88). Included in that enumeration were the provisions relating to

factories and the employment of children therein; those relating to the manufacture of articles in tenements; and those relating to mercantile establishments and the employment therein of women and children (L. 1897, ch. 416). But an amendment passed in 1913 (L. 1913, ch. 349, sec. 1) has imported into the domain of the law of crimes a vast body of rules which grew up in other fields of law. [The statute (Penal Law, sec. 1275) now contains the sweeping declaration that "any person who violates or does not comply with any provision of the labor law, any provision of the industrial code, any rule or regulation of the industrial board of the department of labor, or any lawful order of the commissioner of labor," shall be guilty of a crime.] (See also second report of the Factory Investigating Commission, January 15, 1913, vol. 1, p. 50.) These penal consequences, imposed by a separate statute, do not of necessity affect the meaning that the Labor Law would have without them. The scope of the duty is one problem; the extent to which the breach may be visited with punishment, another.

[At the outset, therefore, we turn to the Labor Law itself. Section 162 is directed primarily against the employer, and only secondarily against others as they may aid and abet him (*People v. Taylor*, 192 N. Y. 398, 400). He must neither create nor suffer in his business the prohibited conditions. The command is addressed to him. Since the duty is his, he may not escape it by delegating it to others (*People v. Taylor, supra*). He breaks the command of the statute if he employs the child himself. He breaks it equally if the child is employed by agents to whom he has delegated "his own power to prevent" (Lord ALVERSTONE, C. J., in *Strutt v. Clift*, 1911, 1 K. B. 1, 6, 7, and *Emery v. Nolloth*, 1903, 2 K. B. 264). What is true of employment, must be true of the sufferance of employment (*Bond v. Evans*, L. R. 21 Q. B. D. 249). The personal duty rests

on the employer to inquire into the conditions prevailing in his business. He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates. He must then stand or fall with those whom he selects to act for him. } He is in the same plight, if they are delinquent, as if he had failed to abate a nuisance on his land (*The Queen v. Stephens*, L. R. 1.Q. B. 702; *Tenement House Department N. Y. City v. McDevitt*, 215 N. Y. 160, 167, 168), or had failed to furnish a safe place of work (Labor Law, sec. 200). It is not an instance of *respondeat superior*. It is the case of the non-performance of a non-delegable duty (*Hankins v. N. Y., L. E. & W. R. Co.*, 142 N. Y. 416, 420). There are a host of other provisions of the Labor Law where the duty must be held personal, or we nullify the statute (Secs. 69, 79, 81, 83a, 83b, 94).

[The employer, therefore, is chargeable with the sufferance of illegal conditions by the delegates of his power. But to say that does not tell us how sufferance may be implied. We do not construe the statute with all the rigor urged by counsel for the People. Not every casual service rendered by a child at the instance of a servant is "suffered" by the master. If a traveling salesman employed by a mercantile establishment in New York gives a dime to a boy of thirteen who has carried his sample case in Buffalo, the absent employer is not brought within the grip of the statute. Sufferance as here prohibited implies knowledge or the opportunity through reasonable diligence to acquire knowledge. } This presupposes in most cases a fair measure at least of continuity and permanence (*Tenement House Dept. N. Y. City v. McDevitt*, *supra*, p. 164). But the duty to inquire existing, there is no safety in ignorance if proper inquiry would avail (*Purtell v. Phila. & R. Coal & Iron Co.*, 256 Ill. 110, 117). { Whatever reasonable supervision by oneself or

one's agents would discover and prevent, that, if continued, will be taken as suffered. Within that rule, the cases must be rare where prohibited work can be done within the plant, and knowledge or the consequences of knowledge avoided. But where work is done away from the plant, the inference of sufferance weakens as the opportunity for supervision lessens. No one would say that an employer had suffered the continuance of a wrong because some pieceworker, working at home on a garment, had been aided by a child. In such a case, the true implications of sufferance would be almost instinctively perceived. On the other hand, we think the statute draws no distinction between sufferance and permission. This is apparent from its scheme as revealed in related sections (Labor Law, secs. 70, 161, 93, 131). The two words are used indiscriminately. In such circumstances, each may take some little color from the other. Permission, like sufferance, connotes something less than consent. Sufferance, like permission, connotes some opportunity for knowledge. Thus viewed, the scheme of the statute becomes consistent and uniform.]

From the Labor Law itself, and the definition of the statutory duty, we pass to the Penal Law, and the determination of the statutory penalties. It is only in their application to section 162 of the Labor Law that those penalties concern us. What the Penal Law means in its application to other sections, we do not attempt to say. Such cases must be dealt with as they arise. Slight differences in the mischief to be remedied or in the wording of the law or in the presumable purpose of the law-makers may work a change of meaning (*The Queen v. Tolson*, L. R. 23 Q. B. D. 168, 174). When the problem is thus limited, the answer is not doubtful. [Any act or omission that will charge an employer with a breach of section 162 of the Labor Law becomes by force of this section 1275 a breach of the Penal Law as well.

That is the plain meaning, and we are not at liberty to detract from it. There was power in the legislature to impose this stringent penalty and to punish offenders by fines moderate in amount. We have recently sustained the exercise of a like power where the fine was recoverable through the form of a civil action (*Tenement House Dept. N. Y. City v. McDevitt*, *supra*). The substance of constitutional power is not changed though the remedy for the collection of the fine is by information or indictment (*Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 104; *The Queen v. Stephens*, L. R. 1 Q. B. 702; *Bond v. Evans*, *supra*). Prosecutions and fines for nuisances, created by an agent in the absence of the owner, have long been known to the law (*The Queen v. Stephens*, *supra*; *Rex v. Medley*, 6 C. & P. 292; *Smith, Master and Servant* [5th ed.], 272, 279). "If my servant throws dirt into the highway, I am indictable" (HOLT, C. J., in *Tuberville v. Stampe*, 1 Ld. Raymond, 264). Other illustrations of like remedies abound (*Comm. v. Sacks*, 214 Mass. 72; *Comm. v. Mixer*, 207 Mass. 141; *State v. Gilmore*, 80 Vt. 514; *Heiton v. M'Sweeney*, 1905, 2 I. R. 47; *Davis v. Bemis*, 40 N. Y. 453, 454, note, citing *Attorney-General v. Siddon*, 1 Cr. & J. 220). In these and like cases, the duty to make reparation to the state for the wrongs of one's servants, when the reparation does not go beyond the payment of a moderate fine, is a reasonable regulation of the right to do business by proxy. That right is not strictly absolute any more than any other. In such matters, differences of degree are vital (*Ten. House Dept. N. Y. City v. McDevitt*, *supra*, at p. 169; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223). Even a fine may be immoderate (*Standard Oil Co. of Indiana v. Missouri*, 224 U. S. 270, 286; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 111). But in sustaining the power to fine, we are not to be understood as sustaining

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to a like length the power to imprison. We leave that question open. That there may be reasonable regulation of a right is no argument in favor of regulations that are extravagant. Exceptional principles apply to callings of such a nature that one may be excluded from them altogether. Of these it may be true that by engaging in them at all, one accepts the accompanying conditions (*Miller v. Strahl*, 239 U. S. 426; *People v. Rosenheimer*, 209 N. Y. 115; *People v. Roby*, 52 Mich. 577). We speak rather of callings pursued of common right, where restrictions must be reasonable (*People v. Beakes Dairy Co.*, 222 N. Y. 416, 427). This case does not require us to decide that life or liberty may be forfeited without tinge of personal fault through the acts or omissions of others (*Comm. v. Stevens*, 153 Mass. 421, 424, 425; *Comm. v. Morgan*, 107 Mass. 199, 203; *Comm. v. Riley*, 196 Mass. 60, 62; *Mousell Bros. v. London & N. W. Ry. Co.*, 1917, 2 K. B. 836, 843, 844; *The Queen v. Tolson*, *supra*, at p. 185). The statute is not void as a whole though some of its penalties may be excessive. The good is to be severed from the bad. The valid penalties remain.

Our conclusion is that there is some evidence of the defendant's negligence in failing for six months to discover and prevent the employment of this child; that the omission to discover and prevent was a sufferance of the work; and that for the resulting violation of the statute, a fine was properly imposed.]

The judgment should be affirmed.

POUND, J. (concurring). Section 162 of the Labor Law (Cons. Laws, chap. 31) imposes within its limits an absolute prohibition of child labor. The child whose job is casual, who has no continuity of employment, may not be said to "work in or in connection with the business," as the word implies some regularity of occupation. The ques-

tion of personal liability of directors seems to be answered by our decision in *People v. Taylor* (192 N. Y. 398). They are not within the statute except as they act individually. Two objections to the exclusion of the elements of knowledge and due diligence are thus disposed of. On the question whether an employer, acting without personal fault, may be imprisoned for the act or omission of his servant, I think that we should preserve entire neutrality at this time. It may be argued that the preliminary act of the principal from which criminal liability may flow is the engaging in a business in which child labor is prohibited; that the offense is established when it is shown that the child worked in or in connection with the business and that the element of personal fault is thus present. (*Com. v. Smith*, 166 Mass. 370, 375, 376; *People v. Roby*, 52 Mich. 577; *Loch v. State*, 75 Ga. 258.) The employment of children is as much under the ban as is the sale of liquor to them and for the same considerations of public welfare. This point is probably sufficiently saved in the prevailing opinion.

CRANE, J. (concurring). I concur in the opinion of Judge CARDOZO, but I do not think that we should leave the question of punishment by imprisonment open for further discussion. The matter is here, in my judgment, for determination.

The defendant has been charged with a misdemeanor in having violated the provisions of section 162 of article 12 of the Labor Law, being chapter 36 of the Laws of 1909, which read:

"No child under the age of fourteen years shall be employed or permitted to work in or in connection with any mercantile or other business or establishment specified in the preceding section."

The defendant maintained a milk route for distributing

milk and came within the provisions of this section. It apparently did everything that could be done to comply with this law. The drivers of its wagons were sent out early in the morning to various parts of the city, not returning until midday. The defendant not only established rules against the employment of boys under fourteen by the drivers but employed inspectors to follow them upon their routes and see that the instructions were obeyed. The conviction of the defendant has proceeded upon the theory that it is guilty for an act of its driver violating this law irrespective of its knowledge or consent and the exercise of every effort that could be made to prevent it. It is said that the law having been violated by its servant the defendant is liable and that there can be no defense.

I recognize that this is the law regarding many police regulations and statutes creating minor offenses and that there is a distinction between acts *mala prohibita* and *mala in se*, but I do not believe that the legislature is unlimited in its power to make acts *mala prohibita* with the result that an employer can be imprisoned for the acts of his servant. (*People ex rel. Cossey v. Grout*, 179 N. Y. 417, at p. 433.) Nearly all the cases upon this subject have been those fixing a penalty to be recovered either in a civil or a criminal proceeding. Others have been prosecutions for a misdemeanor such as in this case resulting in a fine. To this extent I concede that the employer is liable irrespective of his knowledge or negligence, but when an employer may be prosecuted as for a crime to which there is affixed a penalty of imprisonment for an act which he in no way can prevent, we are stretching the law regarding acts *mala prohibita* beyond its legal limitation. (*Chicago, B. & Q. Ry. v. United States*, 220 U. S. 559.)

While this case has to do with a corporation which can only be fined yet the law is equally applicable to an

individual. Section 1275 of the Penal Law provides that for a second or third violation of the Labor Law imprisonment may be inflicted. An individual, therefore, carries on the milk business at the risk of being imprisoned for acts over which he has absolutely no control. The liquor cases which are numerous are hardly pertinent. Such business may be prohibited altogether but not so with the milk trade.

It can be said that the situation which I have here stated is not presented by this case as the defendant is a corporation or, as this is the first offense, it can only result in a fine. If the legislature is limited in its power to punish acts *mala prohibita*, this case, I think, presents the matter in such a way that we should say so. The statute defines the crime and annexes a penalty which is a fine for the first offense or possible imprisonment for the second offense. The argument in court and upon the briefs has been that the legislature is unlimited in dealing with acts *mala prohibita*. Some of the cases to which we have been referred, and the opinion below in this case, indicate that as long as an act is prohibited by a statute and is not *malum in se*, persons may be punished for the acts of their agents upon the theory of *respondeat superior* or else are charged by law with knowledge which they could not otherwise possess. Strictly speaking the doctrine of principal and agent has no place in the criminal law. (*People v. McLaughlin*, 150 N. Y. 365-385.) We should not leave it for a trial judge, when the case arises, to impose a fine instead of imprisonment in order to avoid a question of legality.

It is unnecessary to state that that which constitutes guilt in a corporation would also be the same for the individual under like circumstances.

In brief I spell out the law fixing offenses under the police power of the legislature and known as acts *mala prohibita* to be this:

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1. The defendant is liable for what he directs or authorizes.

2. He is liable for that which is done with his knowledge, although not his consent, and knowledge may be proved by circumstantial evidence.

3. He may be made liable for penalties or fines in the nature of penalties to be recovered in civil or criminal actions, for acts committed by his servants without his knowledge or consent and against his direct prohibition. As is stated in some of the cases he acts in these matters through his servants at his peril. These are all made minor offenses and hardly rise to the rank of crimes. But when this third class are made crimes punishable by imprisonment, I believe the legislature exceeds its power.

HISCOCK, Ch. J., COLLIN, CUDDEBACK and ANDREWS, JJ., concur with CARDOZO, J.; POUND and CRANE, JJ., each in memorandum, also concur.

Judgment affirmed.

WALDO D. PUTNAM, Respondent, v. INTERIOR METAL MANUFACTURING COMPANY, Appellant.

Warranty — when error to exclude evidence tending to show breach of warranty.

Where in an action to recover for goods sold the answer sets up a counterclaim alleging breach of warranty and the reply does not deny that there was such a warranty it is error to exclude evidence which tended to show that the articles furnished were not fit and proper for the purposes intended.

Putnam v. Interior Metal Mfg. Co., 173 App. Div. 967, reversed.

(Submitted November 19, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

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entered May 26, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Smith for appellant. The exclusion of parol evidence of the warranty admitted by the pleadings was reversible error. (*Thomas v. Scutt*, 127 N. Y. 133; *Studwell v. Bush Co.*, 126 App. Div. 818; 206 N. Y. 416; *Getty v. Town of Hamlin*, 46 Hun, 1; *Dale v. Gilbert*, 128 N. Y. 625; *Chapin v. Dobson*, 78 N. Y. 74; *Lese v. Lamprecht*, 196 N. Y. 32; Wigmore on Ev. § 2430; *Vaughn Machine Co. v. Lighthouse*, 64 App. Div. 138; *Foot v. Bentley*, 44 N. Y. 166; *De Jonge & Co. v. Printz*, 49 Misc. Rep. 112.)

Joseph H. San for respondent. The court properly excluded the evidence which the defendant attempted to introduce in support of the warranty alleged in its answer. (*Corse v. Peck*, 102 N. Y. 513; *Becker v. Higgins*, 21 N. Y. 397; *Pollen v. Le Roy*, 30 N. Y. 549; *Lese v. Lamprecht*, 196 N. Y. 32.)

CUDDEBACK, J. The action was brought to recover the sum of about \$800, a balance due on the sale by the plaintiff to the defendant of certain Norton elevator door checks and closers.

The answer set up a breach of warranty that the appliances were fit and proper for the purposes intended. The answer further set up a counterclaim based mainly on a breach of warranty. The reply did not deny that there was such a warranty; therefore, it stood admitted.

The trial court directed a verdict in favor of the plaintiff and dismissed the counterclaim. That determination has been unanimously affirmed at the Appellate Division.

On the trial evidence which tended to show that the

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articles furnished were not fit and proper for the purposes intended was excluded.

It is plain that with the warranty admitted by the pleadings the defendant could show a breach of the warranty. Therefore, there was error in the court's ruling which led to the dismissal of the defendant's counterclaim and to the direction of a verdict against him for the full amount of the plaintiff's demand.

We are constrained to reverse the judgment appealed from.

The judgment should be reversed and a new trial granted, costs to abide the event.

HISCOCK, Ch. J., COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

FRANK M. DOWLER, an Infant, by FRANK DOWLER, His Guardian ad Litem, Appellant, v. JOSEPH JOHNSON, Respondent.

Negligence — New York (city of) — when officers and men of fire department not exempt from limitations in respect of speed — action against fire commissioner for injuries from automobile in which he was being driven by fireman — commissioner not exonerated as of course.

1. Officers and men of the fire department of the city of New York are not exempt from the ordinary limitations in respect of speed, unless they are proceeding to a fire (New York Charter, § 784), or are responding for emergency work in case of fire, accident, public disaster or impending danger. (Code of Ordinances of New York, chap. 24, art. 2, § 19, subd. 1.)

2. In an action against the fire commissioner of the city of New York to recover for personal injuries alleged to have been sustained by plaintiff through a collision with the automobile in which the commissioner was being driven by a fireman upon a tour of inspection, it was error to exclude testimony that the automobile was being driven at excessive speed on the theory that because the relation

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between the defendant and the driver was not that of master and servant, no speed, however excessive, could tend to fasten upon the defendant a liability for the wrong. If the defendant permitted an excessive speed to be maintained, after reasonable opportunity for protest, a jury might find his silence equivalent to approval, and ratification may be equivalent to command. The defendant had a right to restrain the driver who was subject to his orders and he is not exonerated as of course because the driver was not his servant.

Dowler v. Johnson, 171 App. Div. 935, reversed.

(Submitted November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 13, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Herbert C. Smyth, James B. Mackie and Julius M. Lowenstein for appellant. Defendant was in law liable under the rule of *respondeat superior*. (*Maxmilian v. Mayor*, 62 N. Y. 160; *People ex rel. Croker v. Sturgis*, 91 App. Div. 286; *People ex rel. Clifford v. Scannel*, 74 App. Div. 406; 173 N. Y. 606; *People ex rel. Hart v. Fire Comrs.*, 82 N. Y. 358; *People ex rel. Kent v. Fire Comrs.*, 100 N. Y. 82; *Reed v. Met. S. Ry. Co.*, 58 App. Div. 87; *Higgins v. W. U. Tel. Co.*, 156 N. Y. 75.) Public officers are liable personally to third persons who are injured by their personal negligent conduct. (*Murphy v. Comrs. of Education*, 28 N. Y. 134; *Day v. Reynolds*, 23 Hun, 131; *Hartwell v. Riley*, 47 App. Div. 154; *Bryant v. Town of Randolph*, 133 N. Y. 70; *Bennett v. Whitney*, 94 N. Y. 302; *Litchfield v. Bond*, 186 N. Y. 66.)

William P. Burr, Corporation Counsel (Terence Farley of counsel), for respondent. A public officer is not liable for the acts or omissions of the official subordinates

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appointed by him or working under his direction, if they are not in his private service, but may themselves be considered as officers of the municipality or state, unless such officer personally directed the performance of the act complained of, or personally co-operated in the negligence from which the injury resulted, if he exercised reasonable care in the selection of the subordinates. (22 Ruling Case Law, 487; *Murphy v. Emigration Comrs.*, 28 N. Y. 134; *Cardot v. Barney*, 63 N. Y. 281; *Donovan v. McAlpin*, 85 N. Y. 185; *Walsh v. Trustees, etc.*, 96 N. Y. 427; *Bieling v. City of Brooklyn*, 120 N. Y. 98; *Bailey v. Mayor, etc.*, 3 Hill, 531; *Brissac v. Lawrence*, 2 Blatch. 121; *United States v. Broadhead*, 24 Fed. Cas. 1242; *Rubens v. Robertson*, 38 Fed. Rep. 86; *Mister v. Brown*, 59 Fed. Rep. 912; *Riggin v. Brown*, 59 Fed. Rep. 1006.)

CARDOZO, J. The defendant in 1913 was the fire commissioner of the city of New York. On March 20 of that year, he left fire headquarters in one of the department's automobiles to inspect some new fire houses in Brooklyn. The automobile was driven by a fireman assigned to that duty by the commissioner upon the recommendation of the fire chief. While so driven, it collided with another automobile, and the plaintiff was injured. The complaint charges that at the time of the collision the automobile carrying the defendant was driven under his orders, and that it was driven negligently and at excessive speed. The officers and men of the fire department are not exempt from the ordinary limitations in respect of speed, unless they are "proceeding to a fire" (Charter of N. Y. sec. 784) or "responding for emergency work in case of fire, accident, public disaster, or impending danger" (Code of Ordinances of N. Y. chap. 24, art. 2, sec. 17, subd. 1). The plaintiff's counsel in opening the case stated that the defendant's car was

going at the rate of fifty miles an hour. He was about to offer evidence of the negligence charged when he was checked by a ruling of the court that no matter what the action or negligence of the chauffeur might be, the defendant was not liable. The record is very informal, and the plaintiff's offer of proof is not as definite as we might wish; but we think there is no doubt in respect of the ruling which the court intended to make. The court's view was that because the relation between the defendant and the driver was not that of master and servant, no speed, however excessive, could tend to fasten upon the defendant a liability for the wrong. The complaint was dismissed; and on appeal to the Appellate Division the judgment was affirmed by a divided court.

We think there was error in refusing to give the plaintiff an opportunity to unfold his case. We see no repugnancy between the complaint and the opening. None certainly can be found in the mere relation that subsisted between the defendant and the driver. We do not doubt the rule invoked by counsel for the defendant, and sustained by superabundant citations, that public officers are not liable for the negligence of their subordinates unless they co-operate in the act complained of, or direct or encourage it (*Lane v. Cotton*, 1 *Ld. Raymond*, 646; *Bailey v. Mayor, etc., of N. Y.*, 3 *Hill*, 531, 538; *Cardot v. Barney*, 63 *N. Y.* 281; *Robertson v. Sichel*, 127 *U. S.* 507; *Ely v. Parsons*, 55 *Conn.* 83; *Story on Agency*, sec. 319). That is at least the general rule, and if it is subject to any other qualifications, they are not now material. But here the very question is whether the defendant did direct or encourage the negligent act or personally co-operate in it. Undoubtedly he is not liable for the negligence of the driver on the theory of *respondent superior*. The relation between them was not that of master and servant. If he had been out of the car at the time of the accident, no one would suggest that he

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must answer for the driver's wrong. Even his presence in the car would be insufficient of itself and in all circumstances to charge him with liability. There must have been command or co-operation (*De Carvalho v. Brunner*, 223 N. Y. 284, 287; 1 Cooley on Torts [3d ed.], pp. 213, 244). But ratification may be equivalent to command, and co-operation may be inferred from acquiescence where there is power to restrain. The charge is that this car was going at the rate of fifty miles an hour. The charge is that it was going under the defendant's orders. If the defendant permitted such a speed to be maintained, and this after reasonable opportunity for protest, a jury might find his silence the equivalent of approval. Many circumstances would have to be weighed. Chief among them perhaps would be the duration of the offense and the opportunity to restrain it. There was the *right* to restrain here, for the driver was subject to the defendant's orders (Charter N. Y. City, sec. 728); but the right is of no importance unless the omission to exercise it was unreasonable. We cannot say whether the inference of such an omission is legitimate till the whole story has been told. We must see the whole picture. For the purpose of this appeal, it is enough that the defendant is not exonerated as of course because the man at the helm was not his servant. One cannot let oneself be driven at breakneck speed through city streets, and charge the whole guilt upon the driver who has done one's tacit bidding.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, POUND, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

STANLEY N. CARR, Appellant, v. PENNSYLVANIA RAILROAD COMPANY, Respondent.

Negligence — railroad crossing accident — question of contributory negligence ordinarily one for jury — degree of care required of traveler approaching railroad crossing — erroneous dismissal of complaint.

1. It is not the law that as a distinct and conclusive circumstance one traveling on the highway must assume that no warning of the approach of trains will be given at a railroad crossing and relax in no degree his vigilance although silence suggest security, nor is it the law that one who has once looked from a proper viewpoint must, at his peril, look again before proceeding.

2. Where in an action to recover for injuries received through being struck by a train at a railroad crossing the evidence indicates that plaintiff approached with his horse under control and his mind on the danger; that he listened and heard nothing; that he looked down the track and saw as much as seven hundred feet at a point when he was only a few seconds from the crossing; that no train was then in sight and that he then looked the other way and immediately the accident happened, it cannot be said, as matter of law, that his negligence was palpable, and therefore a dismissal of the complaint on that ground was erroneous.

Carr v. Pennsylvania R. R. Co., 171 App. Div. 891, reversed.

(Argued November 21, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 7, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Irving W. Cole and *Hamilton Ward* for appellant. On the evidence the questions of defendant's negligence and plaintiff's freedom from contributory negligence were for the jury. (*Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 385; *Feeney v. Long Island R. Co.*, 116 N. Y. 375; *Ernst*

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v. *H. R. R. R. Co.*, 35 N. Y. 9; *Stevermann v. White*, 16 J. & S. 526; *Southe v. Binghamton Ry. Co.*, 168 App. Div. 605; *Townsend v. Brooklyn Heights Ry. Co.*, 168 App. Div. 449; *Brott v. Auburn & Syracuse El. R. Co.*, 220 N. Y. 92; *Thomas v. D., L. & W. R. R. Co.*, 8 Fed. Rep. 729; *Cunningham v. D., L. & W. R. R. Co.*, 142 App. Div. 303; *Davis v. N. Y. C. & H. R. R. R. Co.*, 47 N. Y. 400; *Massoth v. D. & H. Canal Co.*, 64 N. Y. 524; *Dolan v. D. & H. Canal Co.*, 71 N. Y. 285; *Kellogg v. N. Y. C. & H. R. R. R. Co.*, 79 N. Y. 72.)

H. J. Adams and *Frank Rumsey* for respondent. The plaintiff was chargeable with contributory negligence as a matter of law and the motion for a nonsuit and dismissal of the complaint was properly granted. (*Avery v. N. Y., O. & W. R. Co.*, 205 N. Y. 502; *Swart v. N. Y. C. R. R. Co.*, 81 App. Div. 402; 177 N. Y. 529; *Baxter v. A. & S. El. R. Company*, 190 N. Y. 439; *Spencer v. N. Y. C. & H. R. R. R. Co.*, 123 App. Div. 789; 197 N. Y. 507; *Knapp v. N. Y. C. & H. R. R. R. Co.*, 158 App. Div. 175; *Coleman v. N. Y. C. & H. R. R. R. Co.*, 98 App. Div. 349; *Dolfini v. Erie R. R. Co.*, 178 N. Y. 1; *McSweeney v. Erie R. R. Co.*, 93 App. Div. 496; *Cullen v. D. & H. C. Co.*, 113 N. Y. 667; *McAuliffe v. N. Y. C. & H. R. R. R. Co.*, 85 App. Div. 187.)

POUND, J. This is an action to recover damages for personal injuries sustained by plaintiff while driving over a railroad grade crossing. He was struck by a north-bound express train, running at a high rate of speed, quietly and without sounding bell, whistle or other signal. He was nonsuited at the close of his case on the ground that he was guilty of contributory negligence. "The question of contributory negligence in cases of this character is ordinarily one of fact for the jury." (*Massoth v. Prest., etc., D. & H. Canal Co.*, 64 N. Y. 524, 529.) Are

the most favorable inferences that can be drawn from the evidence of plaintiff's witnesses insufficient to permit a jury to conclude that he exercised reasonable care and prudence under the circumstances? The facts and inferences are thus stated most favorably to appellant for the purposes of this appeal.

The accident happened at noon on June 3, 1914. Highway and railroad track intersect at an acute angle. Plaintiff was coming from the south on the main highway, with his wife, in a buggy. He was driving a high-spirited horse which was walking quietly and steadily about three miles an hour. His view to the south of the single railroad track was obstructed by buildings, trees and a board fence, so that it was impossible to see an approaching train until a point was reached forty to sixty feet from the track. At that point plaintiff looked between the boards of the fence and saw that everything was clear in that direction for a distance of seven hundred feet. He then looked north, then he was close to the track and then the accident happened. In a few seconds the train traversed the distance of seven hundred feet while the plaintiff was reaching the crossing. Indisputably, if plaintiff had looked only at a point where the obstruction shut off his view of the approaching train, he could not recover. But that is not this case. The evidence indicates that he approached the crossing with his horse under control and his mind on the danger; that he listened and heard nothing; that he looked down the track and saw as much as seven hundred feet at a point when he was only a few seconds from the crossing and that no train was then in sight. Indisputably, if he had looked again to the south he would have seen the train. When one who is approaching a railroad crossing is heedless of ordinary precautions; when he fails to observe the rules of conduct which are dictated by common experience and common sense, no question remains for a

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jury to pass upon. (*Avery v. N. Y., O. & W. Ry. Co.*, 205 N. Y. 502.) But it is not the law that as a distinct and conclusive circumstance, one must assume that no warning of the approach of trains will be given and relax in no degree his vigilance although silence suggests security, and it is not the law that one who has once looked from a proper viewpoint must, at his peril, look again before proceeding.

The evidence does not demonstrate the absence of care on the part of plaintiff. It suggests that by greater care he might have avoided the accident. It may be that he should have turned and looked again and it may be that a jury would say, on his own evidence, that the accident was chargeable to his failure to be vigilant in looking to the south. On all the evidence, it may be entirely reasonable to conclude that he went to the crossing heedlessly, without thinking of it or paying any attention to it, but we cannot accept his version and say, as matter of law, that his negligence was palpable.

The judgment should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

FIRST NATIONAL BANK OF WAVERLY, NEW YORK,
Respondent, v. BYRAN L. WINTERS, Appellant.

Libel — when corporation may maintain action for libel without proof of special damage — if words complained of are ambiguous, their meaning and application are questions for jury — when entire publication may be shown.

1. A corporation may maintain an action for libel without proof of special damage if the charge is defamatory and injuriously and directly affects its credit or the management of its business and necessarily causes pecuniary loss.

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2. Words accusing a banking corporation of having participated in the sale of intoxicating liquors contrary to law are libelous *per se*.

3. In an action for libel where the words complained of may be construed as a charge of larceny but do not necessarily imply and would not necessarily be understood to imply that the plaintiff had been guilty of more than a mistake or of carelessness, the meaning of the words used and their application should be submitted to the jury and it is error for the court to charge that they were libelous *per se* as charging larceny. (*Sanderson v. Caldwell*, 45 N. Y. 398, 401, followed.)

4. In actions for libel the entire publication may be shown if it leads up to the words said to be actionable, and where an introduction to an article complained of first criticises the president of the plaintiff corporation, then charges him with being opposed to the defendant, and, continuing, gives reasons therefor, among which are contained the alleged libelous words, the introduction is competent, at least as bearing upon the question as to whether the words used might be fairly construed to import a crime or mistake, and its exclusion is erroneous.

First National Bank v. Winters, 174 App. Div. 898, reversed.

(Argued October 11, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 22, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

James Moore and *Byran L. Winters* for appellant. As to the first cause of action the trial justice erred in refusing to submit to the jury, and in charging as a matter of law, that the article was defamatory; that it was applicable to plaintiff, and that as against the plaintiff corporation the article was libelous *per se*. (*Denns v. N. Y. E. J. Pub. Co.*, 210 N. Y. 13; *Morrison v. Smith*, 177 N. Y. 366; *Warner v. Southall*, 165 N. Y. 496; *U. A. Press v. Heath*, 49 App. Div. 247; *Kemble & Mills v. Kaighn*, 131 App. Div. 63.) A statement

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to be libelous *per se* as against a corporation must be of so defamatory a nature as to necessarily and directly affect its credit and occasion pecuniary injury. (*N. Y. Bureau of Information v. Ridgway-Thayer Co.*, 193 N. Y. 666.) As to the second cause of action, the trial justice erred in refusing to leave to the jury, and charging as a matter of law, that the language was defamatory; that it was applicable to the plaintiff, and that as against the plaintiff it was libelous *per se*. (*Beecher v. Press Pub. Co.*, 60 App. Div. 536.)

Harvey D. Hinman for respondent. No proof of damage was necessary. (*S. & L. Bank v. Thompson*, 23 How. Pr. 253; *M. R. F. L. Assn. v. Spectator Co.*, 18 J. & S. 460; *U. A. Press v. Heath*, 49 App. Div. 247; *Arrow Steamship Co. v. Bennett*, 73 Hun, 81; *Reporter's Assn. v. Sun P. & P. Assn.*, 186 N. Y. 437; *Knickerbocker L. Ins. Co. v. Ecclesine*, 2 J. & S. 76; *Town Topics Publishing Co. v. Collier*, 114 App. Div. 191; *Trenton M. L. & F. Ins. Co. v. Perrine*, 3 Zab. 403; *Gross Coal Co. v. Rose*, 126 Wis. 24; *South Helton Coal Co. v. North Eastern News Assn.*, L. R. 1 Q. B. 133; *People's U. S. Bank v. Goodwin*, 148 Mo. App. 364.)

ANDREWS, J. The plaintiff is a banking corporation doing business in the village of Waverly. On December 30th, 1910, the defendant published in a newspaper controlled by him an article in which he stated that while he kept his newspaper account with the plaintiff he deposited a check for \$100. This check was not properly credited to the account and, as a result, when later checks were drawn, he was informed that the account was overdrawn. The plaintiff insisted for some time that no mistake had been made and finally the defendant wrote to Mr. Lyford, its president, asking why the proper credit had not been given. In reply Mr. Lyford wrote that they had made a mistake and were not infallible.

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The article then proceeded: "During this transaction some ten days had elapsed and the question would naturally arise how could the books of the First National Bank balance without giving this credit to the *Free Press* and where was this \$100 during all this time. Thereafter Mr. Winters changed the *Free Press* account as well as his own account from the First National to the Citizens Bank."

The trial court said to the jury that this was a charge that the plaintiff was guilty of larceny and so was libelous *per se*. It further said that the libel applied to the plaintiff. We think this was error. As we have said, "In an action for defamation, if the application or meaning of the words is ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine upon all the circumstances, whether they were applied to the plaintiff, and in what sense they were used." (*Sanderson v. Caldwell*, 45 N. Y. 398, 401.)

The words used are capable of the construction given them by the trial court. Of this there can be no doubt. They may well apply to the plaintiff. But may there also be fairly given to them an innocent sense? Could it fairly be said that they do not refer to the plaintiff? Might hearers of common and reasonable understanding differ in their interpretation of them?

We think this is quite possible. The words do not necessarily imply and would not necessarily be understood to imply that the plaintiff had been guilty of more than a mistake or of carelessness. They do not necessarily charge the bank with larceny and would not necessarily be understood to make such a charge. It might well be that the deposit had been credited to some different account. Neither if a crime was in fact committed was

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the bank or one of its officers necessarily guilty. That being so, the meaning of the words used and their application should have been submitted to the jury.

A question of evidence bearing upon this cause of action has also been argued before us. The trial court excluded a somewhat long introduction to the article. In this we think it erred. The general rule is that in actions for libel the entire publication may be shown for the purpose of determining the meaning and application of that portion for which the action is brought if it leads up to the words said to be actionable. Those words often may be modified or explained by the introduction.

In this case the introduction criticises Mr. Lyford, the president of the bank, for various acts alleged to have been committed by him. It then asks why Mr. Lyford is opposed to the *Free Press* and gives some reasons. It continues that there are other reasons, to one of which it will briefly refer, and then follows the portion of the article complained of. This introduction was competent, at least as bearing upon the question as to whether the words used might be fairly construed to import a crime or a mistake.

The plaintiff also claims that certain other articles published by the defendant were libelous. As to each of these the court told the jury that the words used referred to the plaintiff and that it accused it of having participated in the sale of intoxicating liquors contrary to law, and of arson. The articles are long and need not be recited in this opinion. In view of what has already been said it is sufficient to hold that the interpretation of the words used in the article complained of in the third cause of action and their application should have been left to the jury. As to the words used in the first cause of action the majority of the court is of the opinion that the trial judge was right in his ruling that they were libelous *per se* and that they did refer to the plaintiff.

Under neither the first nor the third cause of action was there testimony as to special damages. It is said by the appellant that as the plaintiff is a corporation there can be no recovery, because of this fact. In this he is mistaken. The same rule is applicable to a corporation as to individuals. Where the latter may recover without proof of special damage, a corporation may also. Does the publication tend to blacken its reputation and to bring upon it hatred, ridicule or contempt? It is true that many statements that might harm an individual would not harm a corporation. A corporation has no personal reputation. But other charges would affect it equally with an individual. A charge of insolvency — for instance, or that its business was carried on dishonestly. And so it may be stated as a general rule that a corporation may maintain an action for libel without proof of special damage if the charge is defamatory and injuriously and directly affects its credit or the management of its business and necessarily causes pecuniary loss. (*New York Bureau of Information v. Ridgway-Thayer Company*, 119 App. Div. 339, 342; reversed on dissenting opinion, 193 N. Y. 666; *Reporters' Association of America v. Sun Printing & Publishing Assn.*, 186 N. Y. 437.)

Such is clearly the effect of the charge of violating the excise law if understood as the court holds it should be, and the charge of arson if the jury find that to be the meaning of the third article. To say of a bank that it violates the excise law to protect its securities, or burns a building upon which it holds insurance, is a direct attack on its business methods. If believed such charges necessarily destroy public confidence in its integrity and injure its credit. They affect the corporation as directly as charges of dishonorable conduct in business would affect an individual. (*South Hetton Coal Company v. North Eastern News Association*, 1894, 1 Q. B. 133.) Here the plaintiff, the proprietor of a colliery, owned

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a number of cottages used in connection with it. The alleged libel was an article with regard to the condition of these cottages. Such an article, the court held, was calculated to injure the plaintiff's reputation in the way of its business and no special damage need be proved.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and CRANE, JJ., concur.

Judgment reversed, etc.

EMPIRE DEVELOPMENT COMPANY et al., Appellants, v.
TITLE GUARANTEE AND TRUST COMPANY, Respondent.

Title guaranty — when vendee who at time of execution of contract of sale knew of defect in title cannot recover against drawer of contract and of subsequent deed for failure to protect him — policy of insurance may define "loss" intended to be covered — when owner of real property may insure himself against defects in title of which he had knowledge — when dismissal of counterclaim pleading facts which would entitle insurer to reformation of policy is error.

1. Where, in an action to recover for the alleged negligence of defendant, a title guarantee company, for error in drawing a contract for the purchase of real property and the subsequent deed, whereby the plaintiff, its employer, became liable to pay certain assessments, it appears by uncontradicted evidence that at the time the contract of sale was made the plaintiff knew of the assessments, the complaint is properly dismissed, since, knowing the facts, the negligence of the defendant, if there was any, in no way injured the plaintiff.

2. While every policy of insurance is so far a contract of indemnity that the insured must possess an insurable interest and that wagers are prohibited, there is no fundamental objection to definition between the parties to an insurance contract of the loss which they intend to cover, so long as it is made in good faith and not as merely the cover of a wager.

3. The words "loss or damage" in a policy insuring the owner of real property against loss by reason of defective title thereto and

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other incumbrances thereon can only mean damages caused to the owner by an existing defect in the title. Hence, it is error to dismiss the complaint in an action against the insurer to recover the amount of assessments paid by the insured because the latter knew that at the time title passed and the policy was dated the lien of such assessments had been perfected. Against the payment of these liens the owners had a right to secure themselves and the mere knowledge by them of the defect did not constitute a defense.

4. Where, however, undisputed evidence shows that both parties knew of the assessment and that the issuance of the policy was delayed and an agreement made that the particular assessment should not be excepted from the policy because of the promise of the plaintiffs that they would pay the same and have it canceled and thereafter the assessment was paid by the plaintiffs and the policy was issued but its date was given as before the payment, the defendant is entitled to a reformation of the policy so as to relieve it from paying this particular assessment, and where such a defense was pleaded as a counterclaim its dismissal was error.

Empire Development Co. v. Title Guarantee & Trust Co., 171 App. Div. 116, reversed.

(Argued October 31, 1918; decided December 10, 1918.)

APPEAL from a judgment, entered January 24, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon a verdict directed by the court and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joab H. Banton and *John E. Roeser* for appellants. The defendant was not entitled to a reformation of the contract. (*Levy v. Louvre Realty Co.*, 222 N. Y. 14; *City of New York v. Matthews*, 213 N. Y. 563; *Southard v. Curley*, 134 N. Y. 148; *A. B. Co. v. Allison*, 144 N. Y. 21; *C. S. R. Co. v. T. T. S. Ry. Co.*, 149 N. Y. 51.) It was not error for the trial court to dismiss its counter-

claim asking for reformation, and direct a verdict in favor of the plaintiffs. (*Cannon v. Fargo*, 222 N. Y. 321; *B. P. Co. v. Reinhardt*, 210 N. Y. 162; *City of New York v. Matthews*, 213 N. Y. 563.) The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed. (*El Paso & S. W. R. Co. v. Eichel & Weinkel*, 226 U. S. 591; *Anson on Contracts* [Huffcut's ed.], 376, § 390; *Trenton Potteries Co. v. Title G. & T. Co.*, 50 App. Div. 490; 176 N. Y. 65; *Pearsall v. L. T. Guarantee Co.*, 94 Mo. App. 5, 13; *Minn. Title Ins. Co. v. Drexel*, 70 Fed. Rep. 194, 198; *Foehrenbach v. G. A. T. & T. Co.*, 217 Penn. St. 331; *Ehmer v. Title G. & T. Co.*, 156 N. Y. 10; *Economy Building & Loan Assn. v. West Jersey Title Co.*, 64 N. J. L. 27, 28.)

Harold Swain and *Archer P. Cram* for respondent. The plaintiffs have suffered no loss or damage within the meaning of the policy. (*Trenton Potteries Co. v. Title G. & T. Co.*, 176 N. Y. 65; *Palatine Ins. Co. v. O'Brien*, 68 Atl. Rep. 484.) If the policy, as drawn, imports liability by reason of the assessments in question, then it did not correctly set forth the contract made, and should have been reformed accordingly. (*Taylor v. Bowen*, 52 App. Div. 126; *Pennsylvania Steel Co. v. Title G. & T. Co.*, 193 N. Y. 37, 45; *Trenton Potteries Co. v. Title G. & T. Co.*, 176 N. Y. 65.) The plaintiffs failed to establish any negligence on the part of the defendant. (*Livingston v. Spero*, 18 Misc. Rep. 243.)

ANDREWS, J. The complaint sets forth two causes of action. By the first it is alleged that the defendant issued a policy of title insurance to the plaintiffs covering certain premises conveyed to them at that time; that upon said premises at the date of the policy assessments, not excepted in the policy itself, were a lien; that these assessments, amounting to over \$6,000, were paid by

the plaintiffs and that they sustained a loss in that amount with interest. By the second cause of action it is alleged that the plaintiffs were negotiating for the purchase of the premises described; that the defendant agreed to represent the plaintiffs in the transaction and to safeguard their interests as an attorney would do; to take charge of the matter of the purchase; to advise, guide and direct the plaintiffs and then to insure their title. Because of the negligence of the defendant the contract and deed were not properly drawn and the plaintiffs became liable to the vendors to pay the assessments above mentioned and thereby sustained the losses mentioned in the first cause of action.

At the close of the evidence motions were made by both parties for the direction of a verdict. The trial court directed a verdict for the plaintiffs. Thereupon the defendant withdrew its motion and asked leave to submit the questions of fact involved in the case to the jury. This motion was denied as made too late. From the judgment in favor of the plaintiffs an appeal was taken to the Appellate Division. The Appellate Division reversed the judgment, not on the facts but solely upon questions of law and dismissed the complaint.

We must first determine whether there was any evidence in the case justifying a finding of the trial court in favor of the plaintiffs upon the second cause of action. Without discussing this question in detail it is enough to say that assuming the negligence of the defendant as claimed by the appellants, the uncontradicted evidence shows that the contract of sale between them and the vendors was made on February 13th, 1907. At this time the plaintiffs knew of the assessments. This evidence is not impeached in any way either by witnesses or by facts and circumstances. It may, therefore, be assumed to be true. Knowing the facts the negligence of the defendant, if there was negligence, in no way injured the plaintiffs.

Therefore, so far as this cause of action is concerned the result reached in the Appellate Division was right.

As to the first cause of action, the policy of insurance was executed and delivered to the plaintiffs after July 18th, 1907. It was dated April 4th, 1907, the time when the title was closed and the deed taken. The assessments became liens on February 27th. They were paid by the plaintiffs on April 20th. Concededly the issuance of this policy was part of the transaction relating to the purchase of the property. In pursuance to the arrangement made between the parties the policy insured the plaintiffs against loss or damage which the insured should sustain by reason of any defect or defects of title affecting the premises or affecting the interest of the insured therein or by reason of the unmarketability of the title insured or by reason of liens and incumbrances charging the same at the date of the policy.

The theory of the Appellate Division was that the contract of sale made on February 13th, 1907, provided that the premises were to be taken subject to all assessments which became a lien on the premises after December 14th, 1906. This assessment became a lien after that date. The plaintiffs in their contract had agreed to pay it. Therefore, when they in fact paid it they suffered no loss or damage. They did simply what they had agreed to do. The policy of insurance was an indemnity policy insuring them against loss or damage; and if they sustained none, as they did not in this case, there can be no recovery under it.

This conclusion raises the interesting and important question as to the nature of the usual contract for title insurance. May the owner of land insure his existing title? Or, because it is either good or bad; because in either event his situation is unchanged; because an insurance contract is said to be a contract of indemnity, is such a transaction an idle ceremony? Is the legitimate

business of title insurance companies restricted practically to those cases where an intending purchaser or mortgagee completes the transaction in reliance upon the insurance contract?

It has been said often that every policy of insurance is a contract of indemnity. The accuracy of this statement is a question of definition. If it means that wagers are prohibited; that the insured must possess an insurable interest, it is true to-day. But if the word "indemnity" is given a broader sense; if it means that whatever the language of the contract the insured may recover only the precise amount of the pecuniary damage caused to him by the contingency against which he seeks protection, then it is not now and never has been the inflexible rule. An ordinary fire or marine policy is a contract of indemnity, for it is so written. (*Ferguson v. Mass. M. L. Ins. Co.*, 32 Hun, 306; affirmed, 102 N. Y. 647.) But valued policies of this character may also be written and then, in the absence of fraud, the amount of the loss is immaterial. (*Sturm v. Atlantic Mutual Ins. Co.*, 63 N. Y. 77.) All life policies are substantially valued policies. (*Olmsted v. Keyes*, 85 N. Y. 593; *Rawls v. American Mutual Life Ins. Co.*, 27 N. Y. 282.) A creditor whose debt has been paid after he has obtained a policy on the life of his debtor may still recover. (*Ferguson v. Mass. M. L. Ins. Co.*, *supra.*) As is said by May in his work on Insurance, section 7: "When it is said that fire, life or other insurances, where valued policies obtain, are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the thing insured. The amount of this interest and the amount to be paid in case of loss may be fixed by arbitrary agreement, even before the loss."

There is then no fundamental objection to definition between the parties to an insurance contract of the loss which they intend to cover, so long as it is made in good

faith and not as merely the cover of a wager. The courts will not interfere. Their function is limited to a construction of the contract.

What then is the meaning of the words "loss or damage" as used in the policy before us? It may be observed at the outset that the corporation is authorized to insure the owners of real property and others interested against loss by reason of defective title thereto and other incumbrances thereon. (Insurance Law [Cons. Laws, ch. 28], sec. 170.) This would seem to contemplate the insurance of an existing title. Loss in such a case can only be damages caused to the owner by an existing defect in the title.

We have already quoted the language of the policy. As the statute permitted, the owners are insured against loss by reason of defective title to or an incumbrance upon their property. The policy itself defines what shall constitute a loss. It arises where the insured has been evicted under a judgment of a competent court; where in such a court the existence of a lien or incumbrance has been declared; where, on a sale, the property proves to be unmarketable or where, because of some defect, a mortgage loan has failed. The plaintiffs come precisely within one of these provisions. In a competent court the existence and lien of these assessments has been declared. Because under their contract the plaintiffs are compelled to pay them their loss is no less. As is said in *Foehrenbach v. German-American Tile & Trust Company* (217 Penn. St. 331) the word "loss" is a relative term. Failure to keep what a man has or thinks he has is a loss. What the word means is to be measured by the standard accepted between the parties. As a help to our decision we may examine the purpose and object of the contract. To a layman a search is a mystery and the various pitfalls that may beset his title are dreaded but unknown. To avoid a possible claim against

him; to obviate the need and expense of professional advice, and the uncertainty that sometimes results even after it has been obtained is the very purpose for which the owner seeks insurance. To say that when a defect subsequently develops he has lost nothing and, therefore, can recover nothing, is to misinterpret the intention both of the insured and the insurer. In no sense is the contract a mere wager. Such a contract so made and understood by the parties should be enforced. A decision to the contrary would very materially diminish the business now carried on by title insurance corporations. Further this is the interpretation which the parties themselves have placed upon the contract. The schedule of exceptions refers to a purchase-money mortgage executed by one of the plaintiffs; a reference not necessary if the construction given by the Appellate Division is to prevail. We think also that the conclusion we have reached is that generally accepted in practical business. In at least two cases in other states under such circumstances a recovery has been permitted without the question being raised. (*Minn. Title Ins. & Trust Co. v. Drexel*, 70 Fed. Rep. 194; *Purcell v. Land Title Guarantee Co.*, 94 Mo. App. 5.) It seems to be assumed that loss or damage would be received when, because of a defect in the title, the insured was bound to pay something to make it good. That is the present risk of loss inseparable to every contract of insurance.

If this be the general rule, it governs the case before us. The contract of February 13th provided that the plaintiffs should take the property subject to all assessments which became a lien after December 14th, 1906. They knew of the proceedings pending as to the assessments in question and they knew when the title passed and the policy was dated that the lien had been perfected. Yet it might be vacated or reduced. The proceedings might be without jurisdiction or void. Against the payment

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of these liens they had the right to secure themselves. The result reached by the Appellate Division cannot be sustained except upon the theory adopted by that court, and that theory is dependent upon its construction of the word "loss." For mere knowledge of a defect by the insuring owner would not constitute a defense. A title insurance policy is much in the nature of a covenant of warranty or a covenant against incumbrances. Here we have held that knowledge is immaterial. We see no reason for applying a different rule as to such a policy.

Another question remains. The undisputed evidence shows, as we have said, that both parties knew of this assessment. It further shows that knowing of the assessment the issuance of the policy was delayed and an agreement was made that the particular assessment should not be excepted from the policy because of the promise of the plaintiffs that they would pay the same and have it canceled. Thereafter the assessment was paid by the plaintiffs and the policy was issued but its date was given as before the payment. Under these circumstances the defendant undoubtedly would be entitled to a reformation of the policy so that it might be relieved from paying this particular assessment. (*Trenton Potteries Company v. Title G. & T. Co.*, 176 N. Y. 65.) This defense was pleaded as a counterclaim. The difficulty of the situation is, however, that after the defendant had rested this counterclaim was dismissed by the trial court. Thereafter considerable rebuttal evidence was given and finally judgment was ordered for the plaintiffs. We may not assume that if the counterclaim had not been dismissed the plaintiffs could not have contradicted the evidence given as to their knowledge of the assessment in question; as to the arrangement for delaying the policy and as to the agreement under which this particular assessment was not to be excepted.

The action of the trial court in dismissing the counter-

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claim to which we have referred was erroneous. Therefore, while the action of the Appellate Division in reversing the judgment below was correct, it should not have dismissed the complaint. The questions arising on the counterclaim should have been litigated.

The judgment of the Appellate Division should be reversed and the case should be sent back for a new trial, with costs to abide the event.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO and POUND, JJ., concur.

Judgment reversed, etc.

THOMAS M. RYAN, Respondent, *v.* EMPIRE ENGINEERING CORPORATION, Appellant.

Waters and watercourses — navigation — injury to boat and cargo through failure of contractor to mark shoal in newly-excavated part of Erie canal — erroneous charge as to defendant's negligence and plaintiff's freedom from contributory negligence — improper instruction that jury must add interest to award of damages.

1. In an action against a contractor, engaged in enlarging the Erie canal, for alleged negligence in failing to mark a shoal spot in the newly-excavated part of the canal about thirty to fifty-five feet from the original channel but apparently safely navigable, whereby plaintiff's boat ran aground and with its cargo was damaged, *held*, that although it appears that the defendant was required by his contract with the state to take such precautionary measures as might be necessary to guard against interruption to navigation, it was erroneous for the court in its charge and by refusals to charge to hold as matter of law that the plaintiff's boat was rightfully and without negligence where it was and that defendant as matter of law was guilty of negligence because in the course of and while still engaged in making excavations it allowed this uprising strip of bottom to exist.

2. The trial court instead of defining the rights and obligations of the parties by rigid rules of law should have submitted them to the jury with instructions as to the tests of reasonable conduct and ordinary prudence.

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Points of counsel.

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3. It was improper to instruct the jury that they must add interest to the amount, if any, which they should award as damages for the injury to plaintiff's boat.

Ryan v. Empire Engineering Corp., 172 App. Div. 940, reversed.

(Argued November 18, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 25, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alfred L. Becker and *Frank A. Abbott* for appellant. The charge of the court erroneously held the defendant to a duty as matter of law to maintain a draft of seven feet of water in the uncompleted new channel. There was not even a question of fact as to such duty, and the plaintiff proved no negligence of defendant in this respect. (*Atlee v. Steam Packet Co.*, 21 Wall. 389; *Robinson v. Chamberlain*, 34 N. Y. 389; *Johnson v. Belden*, 47 N. Y. 130; *Adsit v. Brady*, 4 Hill, 631; *French v. Donaldson*, 57 N. Y. 496; *Hicks v. Dorn*, 42 N. Y. 47; *Van Alstine v. Belden*, 41 App. Div. 123; *St. Peter v. Dennison*, 58 N. Y. 416; *Piercy v. Averill*, 37 Hun, 360; *Dunn v. Empire Engineering Corp.*, 147 App. Div. 237; 210 N. Y. 599.) The defendant was not negligent in failing to provide buoys or lights to mark the channel. Reciprocally, the plaintiff was chargeable with contributory negligence as a matter of law, or at least it was a question of fact. The effect of the charge, however, was substantially to instruct the jury as a matter of law that the pilot had a right to go outside of the channel of the old Erie canal. This was error. (*Atlee v. Steam Packet Co.*, 21 Wall. 389; *Davidson S. S. Co. v. United States*, 205 U. S. 187; *Casement v. Brown*, 148 U. S. 615; *The Margaret*, 94 U. S. 494; *The Florence*, 88 Fed.

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Rep. 302; *V. O. Towing Co. v. Wilson*, 63 Fed. Rep. 626; *Harrison v. Hughes*, 125 Fed. Rep. 860.) The court improperly charged that proof that the vessel ran upon an obstruction in the canal was sufficient to establish the defendant's negligence. (*Wandell v. Murray*, 239 Fed. Rep. 847; *Huntley v. Empire Engineering Corporation*, 211 Fed. Rep. 959; *Ottis v. Ludington's Sons*, 229 Fed. Rep. 538; 229 Fed. Rep. 454; *Morris v. L. S. & M. S. Ry. Co.*, 148 N. Y. 182; *Cadwell v. Arnheim*, 152 N. Y. 182; *Rupert v. Brooklyn Heights R. R. Co.*, 154 N. Y. 94; *Travell v. Bannerman*, 174 N. Y. 52.) The court erred in its refusal to admit evidence showing a prior statement by the witness Gillson, contrary to his evidence on the trial. (*Reed v. McCord*, 160 N. Y. 330.) The court erred in charging the jury, as matter of law, that the plaintiff was entitled to interest on the amount recoverable for the value of the boat during the time she was out of commission. (*Walrath v. Redfern*, 18 N. Y. 457; *Black v. Camden & Amboy R. Co.*, 45 Barb. 40.)

John B. Richards for respondent. The fact that the obstruction upon which the *Hudson* stranded was outside of the navigable channel of the Erie canal as it existed prior to the work of improvement, did not relieve the defendant from the result of its negligence in creating such obstruction and leaving it unmarked and unbuoyed. (*Robinson v. Chamberlain*, 34 N. Y. 389; *Johnson v. Belden*, 47 N. Y. 130; *Adsit v. Brady*, 4 Hill, 631; *French v. Donaldson*, 57 N. Y. 496; *Hicks v. Dorn*, 42 N. Y. 47; *Van Alstine v. Belden*, 41 App. Div. 123; *St. Peter v. Dennison*, 58 N. Y. 416; *Piercy v. Averill*, 37 Hun, 360; *Dunn v. Empire Engineering Corp.*, 147 App. Div. 237; 210 N. Y. 73; *R. S. Towing Co. v. Snare & Triest Co.*, 194 Fed. Rep. 672.) The evidence amply supports the finding of the jury that the defendant was negligent, and there is no failure of proof in that regard. (*Huntley*

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v. *Empire Engineering Corp.*, 211 Fed. Rep. 961; *Griffin v. Manice*, 166 N. Y. 188; *Marceau v. Rulland R. R. Co.*, 211 N. Y. 203; *Sweeney v. Edison Electric Illuminating Co.*, 158 App. Div. 449; *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37; *McNulty v. Ludwig Co.*, 153 App. Div. 206.) It was not error to exclude the testimony of witness William B. Gallagher with reference to an alleged conversation with Captain Gillson. (*Reed v. McCord*, 160 N. Y. 330; *White v. Miller*, 71 N. Y. 118; *Happy v. Mosher*, 48 N. Y. 313; *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447; Greenl. on Ev. [13th ed.] 141, § 113.) The question of plaintiff's contributory negligence was correctly submitted to the jury by the trial court. (*Casement v. Brown*, 148 U. S. 615; *Blanchard v. W. U. Tel. Co.*, 60 N. Y. 510.) The jury did not include interest on the damages to the hull or on damages allowed for loss of use, and the plaintiff alone suffered by reason thereof, since there was no error in the charge that the plaintiff was entitled to interest on such damages. (*Eddy v. Lafayette*, 49 Fed. Rep. 808; *Schnede v. Zenith S. S. Co.*, 216 Fed. Rep. 566; 244 U. S. 246; *The J. C. Gilchrist*, 173 Fed. Rep. 666; Spencer on Marine Collisions, § 206; Roscoe on Damages in Maritime Collisions, 52; *The Bulgaria*, 83 Fed. Rep. 312; *The American*, 11 Blatch. 485; Fed. Cas. 285; *The Rickmers*, 142 Fed. Rep. 305, 314.)

HISCOCK, Ch. J. The defendant had a contract for enlarging the Erie canal near Spencerport to the dimensions required for the barge canal and at the time and place of the accident herein involved had partially completed its contract. It made excavations "in the wet," that is, underneath the surface of water. In the course of its work and at the time of the accident the bank on the towpath side of the canal had been changed and set back somewhat and the excavation upon the other side had been carried a considerable distance beyond the line

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of the original berme bank, and so far as surface indications were concerned there was a waterway for travel much wider than that comprised within the lines of the original canal. As a matter of fact for a considerable distance beyond the original channel on the berme side of the canal the excavation had been made to a depth which rendered passage for a canal boat perfectly safe, with the exception that at one point estimated from about thirty to fifty-five feet beyond the original channel there had been left a strip of bottom ten or fifteen feet long, more or less studded with boulders at its top, and coming so near to the surface of the water that an ordinary canal boat would strike thereon.

Under its contract defendant was required to so conduct its work "as not to interfere with the navigation of the present (old) canal * * * between the 15th day of May and the 15th day of November of each year," and it was required to take "such precautionary measures as may be necessary * * * to guard against the interruption or injury to navigation."

At night in the month of August plaintiff's canal boat, loaded with grain, was being pushed by a steam-propelled boat through the canal in the locality in question, under the guidance of an experienced and qualified pilot. As the latter steered to the berme side in order to pass other boats coming from the opposite direction, plaintiff's boat was shoved upon the strip of bottom above described with the result that its bottom was broken and its cargo substantially damaged. As already indicated, there is some difference in testimony as to the exact location of this accident as compared with the original line of the channel on the berme side, but as I understand the evidence it was not less than thirty nor more than fifty-five feet distant therefrom and was in about the center of the waterway as it then appeared, taking into account the enlarged portion of the canal created by defendant's

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excavations, and there was nothing in the way of buoys or lights to mark the original lines of the canal or the location of this particular strip of bottom which was dangerous to navigation.

Plaintiff recovered a verdict because of defendant's alleged negligence, and because of the latter's claims of error on the trial we are presented with the questions what were the rights of the respective parties and where was the fault, if any, which led to the accident.

In attempting to define these rights the trial court charged, as outlining those of the plaintiff, that "The navigators of the Hudson had the right to assume, in the absence of buoys, lights or other indications, that the waterway was safe, certainly to a reasonable extent beyond the exact lines of the old canal." And it further charged as defining the obligations and liabilities of the defendant that if the boat struck the obstruction which has been referred to and that this was what caused it to sink, "then the plaintiff has made out his case so far as the defendant's negligence is concerned." And further, as accentuating this view, the court refused to charge "that the defendant was not bound to keep any portion of the work *under improvement* in condition for navigation, which was not included within the navigable portion of the Erie Canal," and also that if the place where the boat sank "was merely a portion of the work under improvement, where the excavation was not complete, negligence cannot be imputed to the defendant solely for a failure to remove the materials therefrom to a depth sufficient for navigation."

Thus it was in effect held as matter of law that the plaintiff's boat was rightfully and without negligence where it was although a substantial distance beyond the lines of the Erie canal whereon it was traveling and that defendant as matter of law was guilty of negligence because in the course of and while still engaged in making

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excavations it allowed this uprising strip of bottom to exist.

We think that these instructions were altogether too favorable to the plaintiff and very unfavorable to the defendant. In our opinion the trial court instead of defining the rights and obligations of the parties by rigid rules of law as he did, should have permitted them to be determined by the flexible judgment of the jury under those tests of reasonable conduct and ordinary prudence which are so familiarly applied to the solution of such situations as arose here. (*Davidson S. S. Co. v. United States*, 205 U. S. 187.) Take the case of the plaintiff to whom is attributable the conduct of the pilot. The jury could have said upon the evidence as now presented that the latter was chargeable with knowledge that the old canal at this point was in process of being widened to the dimensions of the barge canal and that he was steering plaintiff's boat beyond the lines of the original canal into the space of new construction where it was fairly to be apprehended that there might be incomplete excavations and resulting dangers to navigation. If the jury did thus determine they could have found that this was taking unreasonable chances and that contributory negligence was chargeable to plaintiff which barred a recovery. But again, while they might have taken this view, we think the evidence also permitted them to take a different one which alike would exonerate plaintiff from the imputation of contributory negligence and impose upon defendant responsibility for the fault of negligence. They might have said that with the obliteration of old lines by new construction a pilot ought not to be charged with knowledge of the exact location of those old lines; that there was nothing in the appearance of the waterway to indicate that the work of excavation was uncompleted or to make a man of reasonable prudence apprehensive that if he steered a

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short distance beyond the line of the old channel he would encounter a small uprising and dangerous space in the midst of what was otherwise perfectly safe navigation, and, therefore, that warning ought to have been given of this threatening condition by buoys, lights or other proper means. If their minds traveled in this direction the jury could have found the defendant to have been negligent.

Without attempting of course to detail all the circumstances or to formulate the exact language in which instructions should have been given to the jury, the foregoing is a statement of the principles which should have underlaid and governed those instructions. As has been pointed out, the ones which were actually given were far away from them and were prejudicial to an extent requiring a reversal of the judgment.

Some other questions are argued which may be briefly answered for guidance upon the new trial.

It was not error to exclude evidence of the witness Gallagher concerning alleged statements made by the witness Gillson that the accident to plaintiff's boat really happened at another place. Gillson had no personal knowledge and could give no evidence in respect of this subject. Any statements he may have made were not a subject of proof.

It was of course improper to instruct the jury that they must add interest to the amount, if any, which they should award as damages for the injury to plaintiff's boat.

The judgment should be reversed and a new trial granted, with costs to abide the event.

COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

ANNA M. RINALDI, Respondent, v. THE MOHICAN COMPANY, Appellant.

Food — implied warranty as to wholesomeness — action may be maintained for breach — when such implied warranty exists — when inaccurate charge harmless.

1. Under section 96 of the Personal Property Law (Cons. Laws, ch. 41) there is no implied warranty of fitness in a sale of food unless the buyer expressly or by implication acquaints the seller with the purpose of the purchase and it appears that the buyer relies on the seller's skill or judgment. This section applies to all sales, including sales of food, and any rules hitherto applied inconsistent with it are abolished. If, however, the buyer has examined the goods there is no warranty as to defects which he should have discovered. The burden of showing that he has made known his purpose and that he has relied upon the seller is on him who claims the existence of the implied warranty.

2. The mere purchase by a customer from a retail dealer in foods, however, of an article ordinarily used for human consumption, by implication, makes known to the vendor the purpose for which the article is required and, where the buyer may assume that the seller has the opportunity to examine the article sold, such a purchase, unexplained, is conclusive evidence of reliance on the seller's skill and judgment.

3. In an action, therefore, to recover damages for sickness caused by eating unwholesome meat purchased by plaintiff from defendant, where all that appears is the ordinary transaction between dealer and customer, a charge to the jury that on every sale of food by a dealer for immediate human consumption there is an implied warranty of its wholesomeness, while inaccurate, is harmless, since if it does not appear that the buyer has examined the goods or, having examined them, has failed to discover defects which he should have found, such an implied warranty exists.

Rinaldi v. Mohican Co., 171 App. Div. 814, affirmed.

(Argued November 21, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 8, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

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Opinion, per ANDREWS, J.

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The nature of the action and the facts, so far as material, are stated in the opinion.

L. B. McKelvey and William H. Foster for appellant. The doctrine of implied warranty in the sale of food products has never been applied in this state to facts like those presented in the case at bar. (*State v. Sturgis*, 222 U. S. 315; *Van Bracklin v. Fonda*, 12 Johns. 467; *Wright v. Hart*, 18 Wend. 449; *Divine v. McCormick*, 50 Barb. 116; *Burch v. Spencer*, 15 Hun, 504; *Moses v. Mead*, 1 Denio, 378; *Julien v. Laubenberger*, 16 Misc. Rep. 646; *Goldrich v. Ryan*, 1 E. D. Smith, 324; *Cotton v. Reid*, 25 Misc. Rep. 380; *Money v. Fisher*, 92 Hun, 340.)

Charles G. Fryer for respondent. A retail dealer in meats and provisions impliedly warrants the soundness and wholesomeness of meats or provisions sold for domestic use and immediate consumption as human food and is liable for damages if they prove unwholesome whether he was aware of their condition or not. (*Race v. Krum*, 222 N. Y. 410; *Leahy v. Essex Co.*, 164 App. Div. 903; *Zelkel v. Oneida C. C. Co.*, 104 Misc. Rep. 251; *Van Bracklin v. Fonda*, 12 Johns. 468; *Rothmiller v. Stein*, 143 N. Y. 581; *Fairbanks Canning Co. v. Metzger*, 118 N. Y. 260; *Hart v. Wright*, 17 Wend. 267; *Divine v. McCormick*, 50 Barb. 116; *Kinch v. Haynes*, 58 Misc. Rep. 499; *Miller v. Scherder*, 2 N. Y. 262; *Swain v. Schiffelin*, 134 N. Y. 471; *Davis Prov. Co. v. Fowler Bros.*, 20 App. Div. 626; 163 N. Y. 580.)

ANDREWS, J. We have held as to a sale of food for immediate consumption made before September 1st, 1911, by a dealer who makes or prepares the articles sold that there is an implied warranty of wholesomeness. (*Race v. Krum*, 222 N. Y. 410.) That is as far as any decision

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of ours has gone. In *Maxwell v. Marsh* (173 App. Div. 1003; affirmed, without opinion, 225 N. Y. —), where tainted meat was sold in 1913, a charge to the jury that such a warranty was to be implied was made without objection. It became, therefore, the law for that case. Yet in *Race v. Krum*, in an opinion in which all the members of the court concurred, there was a full discussion of the rule in this state and the conclusion was reached deliberately "that accompanying all sales by a retail dealer of articles of food for immediate use there is an implied warranty that the same is fit for human consumption." This was an exception to the general rule regarding the sale of other chattels based on grounds of public policy. The opinion, however, expressly refused to consider whether such a warranty existed in the case of hotel proprietors or those engaged in a similar business.

On September 1st, 1911, section 96 of the Personal Property Law (Cons. Laws, ch. 41) took effect. It provided that there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods sold except, among other cases, "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not)." If, however, the buyer has examined the goods there is no implied warranty as regards defects which such an examination should have revealed.

Article 5 of the Personal Property Law is not merely a codification of the existing rules regarding sales in this state. It was the design as far as possible to make our law uniform with the legislation and laws on this subject existing throughout the country. To this end changes were made in what had previously been here the law. In section 96 itself, for instance, the distinction between

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the liability of sellers who were growers and manufacturers and others was ended. A warranty may now be established by proof of the usage of trade. Although an express warranty of quality is given, one not inconsistent with it may also be implied. Having in view the purpose of the article and the fact that in some states no implied warranty based on grounds other than those which affect every sale of a chattel was enforced, we have no doubt that section 96, expressed as it is in general terms, applies to all sales, including sales of food, and that any rules hitherto applied inconsistent with this section are abolished.

In a sale of food, therefore, there is no longer an implied warranty of fitness unless the buyer expressly or by implication acquaints the seller with the purpose of the purchase and unless it appears that the buyer relies on the seller's skill or judgment. Even then if the buyer has examined the goods and should have discovered the defect there is no warranty. The burden of showing that he has made known his purpose and that he has relied upon the seller is on him who claims the existence of an implied warranty. If either of these two facts do not appear he fails in his claim. Whether they exist or not may often become a question of fact to be solved by the jury. But often also, where the facts are undisputed, and no differing inferences may be drawn from them, the question becomes one of law for the court; and we have to determine just what and how much evidence is necessary to show conclusively the existence of these essential elements.

We think that the mere purchase by a customer from a retail dealer in foods of an article ordinarily used for human consumption does by implication make known to the vendor the purpose for which the article is required. Such a transaction standing by itself permits no contrary inferences. In this we agree with the courts

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of Massachusetts. (*Farrell v. Manhattan Market Company*, 198 Mass. 271-279.) But we think further that such a purchase, where the buyer may assume that the seller has the opportunity to examine the article sold, unexplained, is also conclusive evidence of reliance on the seller's skill or judgment. We here limit the rule. We do not pass upon the question as to whether it applies to a sale in the original package bought by the vendor from others. In such circumstances it is possible that the inference of reliance would not be properly deduced from the purchase alone. But on the other hand we do not lay stress on the question as to whether the particular article was selected by the buyer or by the seller. That may or may not be important. If the buyer selects one chicken from twenty offered him, exercising his judgment as to its wholesomeness, clearly he does not, or at least may not rely upon the dealer's skill. But where the buyer selects one of the twenty for some reason unconnected with its fitness for food and exercising and having no judgment on that question — makes the selection because the color is pleasing or the weight suitable, then he is relying upon the dealer no less than when the selection is made by the latter. He assumes that the dealer knows and has the means of knowing that all are fit for food. It is a matter about which ordinarily the purchaser knows and can know nothing.

Therefore, in case of a purchase of unwholesome meat from a market after section 96 went into effect, where all that appears is the ordinary transaction between dealer and customer, a charge to the jury that on every sale of food by a dealer for immediate human consumption there is an implied warranty of its wholesomeness, while inaccurate is harmless. If it does not appear that the buyer has examined the goods or, having examined them, has failed to discover defects

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which he should have found, precisely such an implied warranty exists as the court said existed in all cases whenever a dealer sold food.

Such is the case before us. On December 16th, 1915, the plaintiff bought a loin of pork at a market owned by the defendant. The meat was infested with trichinae. She cooked and ate it and was made ill. The action was brought to recover for the resulting damages. It was not tried on any theory of negligence or fraud but upon that of implied warranty. The jury found a verdict for the plaintiff and the judgment has been affirmed in the Appellate Division. The plaintiff found no defect in the meat. The court submitted to the jury the question as to whether she could have found such a defect if she had used reasonable care. And finally the defendant insists strenuously that no such defect could have been discovered.

There is no question but what such an action for damages caused by the breach of the implied warranty with regard to food may be maintained, at least by him to whom the warranty is made. Whether in favor of others we do not determine. (*Gearing v. Berkson*, 111 N. E. Rep. 785.)

The judgment of the Appellate Division should be affirmed, with costs.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and CRANE, JJ., concur.

Judgment affirmed.

MAY D. HOPKINS, Respondent, v. CONNECTICUT GENERAL
LIFE INSURANCE COMPANY, Appellant.

Insurance — accident — standard provisions of policy not whole contract — rider part of policy and should be filed with superintendent of insurance — effect of failure to file — rider which does not contradict or vary standard provisions valid — classification of risks — provision that change in policy must be approved by officer of company is for benefit of insurer — provision that clause reducing indemnity must be printed in bold-face type when not applicable to rider.

1. The standard provisions for accident insurance policies contained in section 107 of the Insurance Law (Cons. Laws, ch. 28) are to be contained in every such contract of insurance, but they form simply a part, not the whole thereof.

2. A rider to a policy of accident insurance is a part thereof and, therefore, within the requirement of the statute (L. 1913, ch. 155, § 107, subd. a) that no policy shall be issued until a copy of its form shall have been filed with the superintendent of the insurance department. Failure to file a rider, however, does not invalidate the policy, but whenever its provisions conflict with subdivision i of section 107 the latter is to govern the rights of the parties.

3. A rider to a policy of accident insurance, by which the insured agreed that the policy should not cover any loss caused directly or indirectly by any act of any of the belligerent nations engaged in the present European war, does not conflict with or vary any of the provisions of section 107 of the Insurance Law and is valid and binding upon the insured, subject only to construction as provided by that section, notwithstanding that it had not been filed with the superintendent of insurance.

4. A suggestion that the rider changes the classification of risks cannot be sustained since such classification, in accident insurance policies, relates only to the occupation of the applicant.

5. The provision in the policy that no change therein shall be valid unless approved by the executive officer of the insurer is for the benefit of the insurer and may be and in this case was waived by it. Furthermore, the policy was not changed where, at its inception, it included the rider.

6. An objection that under the statute it is provided that no policy shall be issued unless such portion of the policy as purports by reason of the circumstances under which a loss is incurred to reduce any

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indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and that the rider comes within this clause and is not printed in bold-face type cannot be sustained. It speaks of a case in which the policy does not apply and is simply a limitation of the risk. The rider in question does not in any sense reduce an indemnity provided for in the policy, hence does not come within the clause requiring a rider to be printed in bold-face type.

Hopkins v. Conn. General Life Ins. Co., 174 App. Div. 23, reversed.

(Argued November 25, 1918; decided December 10, 1918.)

APPEAL from a judgment, entered August 4, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury and directing judgment in favor of plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles E. Hughes and *George Cogill* for appellant. Section 107 of the Insurance Law does not require forms of riders to be filed or approved. (*Nelson v. Traders Ins. Co.*, 181 N. Y. 472.) The validity of the war rider, being an integral part of the contract of insurance, is expressly recognized by section 107 of the Insurance Law, notwithstanding the fact that the rider was not filed or approved by the superintendent of insurance. (*Kneetle v. Newcomb*, 22 N. Y. 249; *Chemung Bank v. Payne*, 164 N. Y. 252.) The fact that no approval by an executive officer of respondent was indorsed on the war rider or policy does not invalidate it, nor require its elimination from the contract of insurance. (*Insurance Co. v. Norton*, 96 U. S. 234; *Bini v. Smith*, 36 App. Div. 463; *Ætna Life Ins. Co. v. Frierson*, 114 Fed. Rep. 56; *Assurance Co. v. Building Assn.*, 183 U. S. 308; *Whipple v. Prudential Ins. Co.*, 222 N. Y. 39; *Wood v. A. F. Ins. Co.*, 149 N. Y. 382; *Stewart v. U. M. Life Ins. Co.*, 155 N. Y.

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257; *Lewis v. Guardian F. & L. Assur. Co.*, 181 N. Y. 392; *Wysotzkey v. Niagara Fire Ins. Co.*, 112 App. Div. 599; *McClelland v. Mutual Life Ins. Co.*, 217 N. Y. 336.)

Warren C. Van Slyck and *Aaron C. Thayer* for respondent. The war rider is invalid and forms no part of the policy, because of the defendant's failure to comply with the statute. (*Baxter v. Ins. Co.*, 119 N. Y. 450; *Equitable Life Ins. Co. v. Nixon*, 80 Fed. Rep. 796; *Equitable Life Ins. Co. v. Clement*, 140 U. S. 226; *Union Central Life Ins. Co. v. Pollard*, 26 S. E. Rep. 421; *Fidelity Mutual Life Ins. v. Ficklyn*, 74 Md. 172; *Emery v. P. F. & M. Ins. Co.*, 52 Me. 322.) The issuance and delivery of the policy to the insured prior to the filing of a copy of the form of the war rider, or of a copy of the form of the policy with the terms, conditions and provisions of the war rider, incorporated therein as a part thereof, with the superintendent of insurance violated the provisions of subdivision a, section 107, chapter 155 of the Laws of 1913. (*Swing v. Dayton*, 124 App. Div. 58; 196 N. Y. 503; *Elliott on Cont.* § 648; *Page on Cont.* § 332; *Emery v. P. F. & M. Ins. Co.*, 52 Me. 322; *Curtis v. Leavitt*, 15 N. Y. 16; *Chemung Bank v. Payne*, 164 N. Y. 252; *Veeder v. Mudgett*, 95 N. Y. 295; *M. L. Ins. Co. v. Corey*, 135 N. Y. 326; *Handley v. Stutz*, 139 U. S. 417; *Thompson v. Denner*, 16 App. Div. 160.) The rider constituted "a change" in the policy and, as such, it had to have the indorsed approval of an executive officer to validate it under the provisions of the statute and of the policy itself. (*Wood v. A. F. Ins. Co.*, 149 N. Y. 382; *Whipple v. Prudential Ins. Co.*, 222 N. Y. 39.) There was a plain violation of subdivision C of paragraph 6 of section 107 of the Insurance Law. (*Flint v. Provident Co.*, 215 N. Y. 254.)

ANDREWS, J. On April 29th, 1915, the defendant issued an accident policy to Mr. Hopkins in favor of his

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wife for \$40,000 payable in case his death was caused by the burning or wrecking of a vessel on which he was a passenger. Physically attached to this policy was a rider by which the insured agreed that the policy should not cover any loss caused directly or indirectly by any act of any of the belligerent nations engaged in the present European War. This rider was prepared by an executive officer of the defendant, and the agent who negotiated the policy was authorized to deliver it to Mr. Hopkins if and when he signed the rider. Mr. Hopkins did sign and the delivery of the policy was made. By its terms the policy included the rider and the rider itself stated that it formed part of the policy. The form of the policy itself had been properly filed with the superintendent of the insurance department of the state of New York but the rider had never been filed with him. Mr. Hopkins was drowned when the *Lusitania* was torpedoed.

This was the contract which the parties made between themselves. It is to be enforced as they made it and understood it unless, because of some statutory provisions, the courts are required to give it a construction or effect which the parties never intended.

We are told that this must be done because of section 107 of the Insurance Law. (Cons. Laws, ch. 28.) This section is entitled "Standard Provisions for Accident and Health Policies." It largely consists of standard provisions with regard to the details of the insurance contract which must be contained in every policy together with certain optional standard provisions both of which are principally for the protection of the rights of the insured. It is not said nor was it the intention to say that the policy should contain only these standard provisions. Unlike the standard form of fire policy prescribed by section 121 of the same law they are not exclusive. There is no statement as in the case of fire policies that no agreement not contained in the standard provisions shall be made.

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Like the standard provisions in life policies (Section 101) they are to be contained in every contract of insurance but they form simply a part not the whole of such contract. Two rules, however, are laid down. No policy and no rider to a policy shall contradict, vary or alter these standard provisions; and no policy shall be issued until a copy of its form shall have been filed with the superintendent of the insurance department for the purpose of enabling him to determine if it complies with the law.

The rider in question does not contradict or vary any of these standard provisions. But, as we have seen, it was never filed with the superintendent. It is said that in consequence the rider may be ignored and the remainder of the policy, which was duly filed, may be enforced.

The appellant argues that under the statute riders attached to the policies need not be filed. It says that what the statute requires to be filed is a copy of the form of the policy; that running through the statute a distinction is clearly made between the policy itself and indorsements and papers attached to it. We do not think, however, that in requiring the form of the policy to be filed any such distinction was in the mind of the legislature. The rider itself is a part of the policy. The policy itself says so. So does the rider. It affects the risks and the rates which are based upon the extent of the risks assumed. The purpose of the statute is to see to it that the policy itself, of which the rider forms a part, and all its provisions are such as to meet the approval of the superintendent. If it were not so the greater part of the policy might be contained in riders and the object of the statute would be defeated. Nor is the distinction between the form of the policy and the attached papers consistently maintained. Repeatedly in the Insurance Law the legislature refers to "the policy" as meaning the entire contract between the parties. (Sections 59,

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62, 89.) In the very section before us there is the same lack of discrimination. Subdivision d prohibits the issuing of a policy which contains a provision relative to cancellation at the instance of the insurer except in a fixed form. The word "policy" here must include riders. Subdivision e prohibits the issuing of policies purporting to make any portion of the charter of the insurer a part of the policy by mere reference. Here again the prohibition must refer to a rider as well as to the policy itself. Finally the legislature provides that "this policy includes the endorsements and attached papers." (Subd. c, 1.) This would seem to define what it intended by "a copy of the form" of the policy. Nor is the argument with regard to necessity convincing. The need of issuing riders to meet sudden emergencies is answered by the authority given to the superintendent to consent immediately to the form proposed if it is wise to do so.

What then is the result of the failure to file the rider? The statute provides two classes of remedies. If the violation is willful a fine is imposed and if the company is a foreign one its license may be revoked. Next, the policy is valid but it is to be "construed as provided in this section, and when any provision in such a policy is in conflict with any provision of this section, the rights, duties and obligations of the insurer, the policyholder and the beneficiary shall be governed by the provisions of this section." (Section 107, subd. i.) Here again we understand the word "policy" to mean the entire contract whether it is contained in the policy itself strictly speaking or in agreements attached thereto.

The violation of the section referred to may occur in various ways: (1) By issuing a policy before a copy of its form is filed; (2) unless certain statements are made therein; (3) unless it is printed in a particular manner; (4) if it attempts to insure more than one person;

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(5) unless it contains certain standard provisions; (6) if it contains clauses contradicting the standard provisions; (7) if it attempts to incorporate its charter and by-laws in the policy without setting them out in full. However, the section may be violated the policy is still valid. Only it is to be construed as provided in the section, and whenever its provisions conflict with the section the latter is to govern the rights of the parties.

What is intended is in part clear. No corporation issuing a policy may escape liability because of its failure to obey the law. But what is the position of the insured? Clearly as to him the standard provisions are a part of his contract. If it contains clauses contradicting them they may be ignored. So if the company attempts to incorporate its charter by reference. So possibly of clauses or exceptions printed indistinctly. But it does not follow that where the whole or a part of a policy has not been filed, the insured may recover upon a contract never made by him and which the statute does not say he shall be held to have made. The statute says the contract is valid — not simply valid as against the insurer. It is to be construed in a certain way, but the question of construction has no relation to this particular default. Nor have the rights and obligations of the parties. They are fixed by the standard provisions and by the regulations as to what the policy shall or shall not contain and the regulations as to the form required so the insured may have notice of its contents. They are not determined by the decision of the superintendent as to whether the policy complies with the law. This is not the case for an application of the rule that illegal or prohibited contracts are void, even when the statute does not expressly so declare. Here the statute itself says they shall not be void but valid. Neither as we have said is there conflict between the provisions of the rider and the provisions of the section. True, it is suggested that the

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statute provides that the classification of risks mentioned in the policy shall mean only those last filed with the superintendent and that this rider changes this classification without authority. This is not the meaning of the term "classification of risks" in insurance practice. That relates not to the perils insured against nor to the amount to be paid, but in fire insurance to the nature and situation of the articles insured; in accident insurance to the occupation of the applicant. So in this policy it is said "Albert Lloyd Hopkins, under classification referred by occupation as President." This classification was in no wise altered by the rider. The policy which is valid is the contract as the parties have agreed upon it so far as it is consistent with the statute—not the contract as changed and altered by the excision of some of its provisions. What if no part of a policy defining the risks insured against had been filed? Are only the standard provisions which the law says shall be inserted in every policy to be enforced? In themselves they form no complete contract.

The respondent also questions the validity of the rider under the standard clause that "No change in this policy shall be valid unless approved by the executive officer of the insured and such approval be endorsed thereon."

There are two answers to this claim. This clause is for the benefit of the company and may be and was waived by it. (*Belt v. American Central Ins. Co.*, 29 App. Div. 546-552; affirmed, 163 N. Y. 555.) Further, the policy was not changed. At its inception it included the rider. All the papers together constitute the policy and it is as agreed upon by the parties. This is the agreement which the agent was expressly authorized to make and he was prohibited from making any other. The policy never had any existence except as it contained the agreement in the rider. (*Wood v. American Fire Ins. Co.*, 149 N. Y. 382-386.)

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A further objection is made that under the statute it is provided that no policy shall be issued unless such portion of the policy as purports by reason of the circumstances under which a loss is incurred to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and with greater prominence than any other portion or text of the policy. It is said that the rider comes within this clause and is not printed in bold-face type. We cannot agree with this contention. The rider does not in any sense reduce an indemnity provided for in the policy. It speaks of a case in which the policy does not apply. It is simply a limitation of the risk. Such is evidently the construction adopted by the insurance department for a rider regarding hernia is in the same type and as it was filed it must have met the approval of the superintendent.

The judgment appealed from should be reversed and that of the trial court affirmed, with costs in this court, and in the Appellate Division.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO and POUND, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment accordingly.

In the Matter of WILLIAM HAYDORN, Appellant, v. EDWARD R. CARROLL, as Clerk of the Court of General Sessions of the Peace of the City and County of New York, Respondent.

Appeal — construction of Constitution must be directly involved to warrant appeal for that reason, without permission to Court of Appeals, under section 190 of Code of Civil Procedure.

1. An appellant, who relies upon the provision of the Code permitting as of right appeals where a constitutional question is involved (Code Civ. Pro. § 190, as amd. by L. 1917, ch. 200) as

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an authority for his appeal, assumes the burden of presenting a record which establishes that such construction has been not only directly but necessarily involved in the decision of the case. If the decision was or may have been based upon some other ground, the appeal will not lie. (*People ex rel. Moss v. Supervisors*, 221 N. Y. 367, 369, followed.)

2. Where, upon examination of the opinion of the Appellate Division (Code Civ. Pro. § 1237) upon an appeal, taken without permission, from an order of that court unanimously affirming an order of Special Term which denied a mandamus to the clerk of the Special Sessions to permit the petitioner's counsel to inspect an indictment, it appears that the affirmance was based upon the exercise of a discretionary power, the appeal will be dismissed without consideration of the merits.

Matter of Haydorn v. Carroll, 184 App. Div. 151, appeal dismissed.

(Argued October 3, 1918; decided December 13, 1918.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 11, 1918, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to permit petitioner's counsel to examine an indictment for burglary.

The facts, so far as material, are stated in the opinion.

Otho S. Bowling and *Robert H. Elder* for appellant. An appeal lies to this court from the order of affirmance made by the Appellate Division. (Code Civ. Pro. § 190; *Anderson's Law Dic.* 240; *Bouvier Law Dic.*; *Lewis v. U. S.*, 92 U. S. 621; *People v. May*, 9 Col. 85; 8 Cyc. 724, 725; *People v. N. Y. Central R. R. Co.*, 24 N. Y. 485.)

Edward Swann, District Attorney (*Robert S. Johnstone* and *Robert D. Petty* of counsel), for respondent. The order was not appealable as of right to the Court of Appeals. (Code Civ. Pro. § 190; *People ex rel. Moss v. Supervisors*, 221 N. Y. 367.) It must appear upon the record, either expressly or by fair implication, that

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the decision or actual determination of the Appellate Division involved the construction of the Constitution. It is not enough that some point concerning the construction of the Constitution was raised and argued by counsel. The decision must have been such as necessarily involved a construction of the Constitution. (*Matter of Atty.-Gen.*, 155 N. Y. 441, 446; *Adams v. Russell*, 229 U. S. 353; *Western Union Tel. Co. v. Wilson*, 213 U. S. 52; *Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157.) The granting or refusal of a peremptory writ of mandamus being discretionary, the order is not appealable to this court — unless it affirmatively appears that it was made upon grounds not involving the exercise of discretion. (*Matter of Sherrill v. O'Brien*, 186 N. Y. 1, 2, 3; *White v. Benjamin*, 150 N. Y. 258; *People ex rel. N. Y. & H. R. R. Co. v. Bd. of Taxes*, 166 N. Y. 154; *People v. O'Brien*, 164 N. Y. 57; *Richards v. Wells-Fargo Co.*, 215 N. Y. 351.)

HISCOCK, Ch. J. The facts which are relied upon to support petitioner's application are as follows: He was indicted jointly with others and was arrested and arraigned. Section 309 of the Code of Criminal Procedure provides: "If the defendant demand it, the indictment must be read, or a copy thereof furnished to him before requiring him to plead." Petitioner did not at the time of arraignment make any demand under this section, but pleaded not guilty with the reservation of a right subsequently to change his plea and demur to the indictment. Thereafter and within the time prescribed for a change of his plea he did make a demand on the respondent as clerk of the Court of General Sessions, where the indictment was lodged, for an opportunity to inspect or make a copy of the indictment. The clerk offered to read the indictment or furnish a copy thereof to him or his counsel, omitting, however, the names of those who had been indicted with him.

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Justification for this action was asserted on the ground that the other persons jointly indicted had not yet been arrested, and that, therefore, this course was permissible under section 272 of the Code of Criminal Procedure which provides that an indictment when found must be presented "and must be filed with the clerk, and remain in his office as a public record, but it must not be shown to any person other than a public officer, until the defendant has been arrested or has appeared." The defendant claims that this qualified permission was a violation of his rights under the "due process" provisions of the Constitution and that he was entitled to an unlimited examination of the indictment.

The primary question presented is one of practice. The appeal is taken under and subject to the provisions of section 190 of the Code of Civil Procedure as amended by chapter 290, Laws of 1917. It is taken from an unanimous order of affirmance by the Appellate Division and without permission, and the claim of right to do this is based upon the provision of the section which permits as matter of right such an appeal where there is "directly involved the construction of the constitution of the state or of the United States."

In considering the provision of the Code permitting as of right appeals where a constitutional question is involved we must keep in mind the requirement that the construction of the Constitution must be "directly" involved. The circumstance that it may be involved in some indirect and remote sense is not enough to permit an appeal. As was said by Judge COLLIN writing for the court in *People ex rel. Moss v. Supervisors of Oneida Co.* (221 N. Y. 367, 369): "In a certain sense, perhaps, each enforcement of a statute by a court involves its constitutionality or the construction of the Constitution of the state. That sense, however, was not within the legislative mind or intention in enacting the present

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restriction of our jurisdiction. An appeal, upon the ground asserted here, must present to us directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States." The appellant who relies upon this provision as an authority for his appeal assumes the burden of presenting to us a record which establishes that such construction has been not only directly but necessarily involved in the decision of the case. If the decision was or may have been based upon some other ground, the appeal will not lie. We think that in this case it affirmatively appears that the construction of the Constitution was not involved.

The court at Special Term, as appears by its opinion, denied the application enforcing an inspection of the indictment largely on the ground that the appellant by application to the Court of General Sessions wherein the indictment was pending could secure all of the rights to which he was entitled, or if these were denied raise a question of law which could be reviewed on appeal from any conviction. Having thus reached the conclusion, as I think correctly, that the appellant's rights could be enforced otherwise than by a writ of mandamus and which justified the court in denying the application as a matter of discretion (*People ex rel. Ellis-Joslyn Pub. Co. v. Common Council of Lackawanna*, 223 N. Y. 445, 449), the learned court proceeded to make an order explicitly stating that the application was *not* denied as a matter of discretion but as a matter of law.

When the case reached the Appellate Division that court, after the consideration of other questions which we do not find it necessary to review, also took the view entertained by the Special Term that appellant's rights could and would be protected on application to the court where the indictment was pending and, therefore, that his application for the writ against the clerk thereof should not be granted,

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and in this connection it explicitly referred to the principle that the Appellate Division as well as the Special Term was vested with discretionary powers in such matter. It simply affirmed the order of the Special Term and if this were all we might be compelled to regard the affirmance as based upon the law and not upon discretionary powers. In view of the present provision of the Code, however, that the opinion of the Appellate Division must be regarded as part of the papers upon which the appeal is heard in this court (Code Civ. Pro. § 1237; *People ex rel. Flynn v. Woods*, 218 N. Y. 124), we can look to what was therein said in this case for the purpose of determining whether appellant's application has been denied as a matter of discretion. When we do this, it is clearly made apparent that the affirmance was based upon the exercise of a discretionary power and that the construction of the Constitution was in no way involved. This view leads to a dismissal of the appeal without any consideration of the merits of appellant's various propositions.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Appeal dismissed.

MUNICIPAL GAS COMPANY OF THE CITY OF ALBANY,
Appellant, v. PUBLIC SERVICE COMMISSION, SECOND
DISTRICT, Respondent, Impleaded with Others.

Gas companies — inadequate and confiscatory rates fixed by statute — power of courts to regulate rates — aggrieved party may maintain action in equity to restrain enforcement of confiscatory rates — sufficiency of pleading.

1. The legislature enacted a statute which fixed the maximum charge for illuminating gas in the city of Albany at one dollar per thousand cubic feet (L. 1907, ch. 227). The plaintiff in its complaint herein asserts that changed conditions have made those charges inadequate,

and that to compel adherence to the statute is to confiscate its property. It further alleges that during the year 1917 and the first six months of 1918 there was a large deficit owing to the decrease in net earnings; that the deficit is increasing and likely to increase further; that the cost of material and of labor has risen with the war, and that there is no prospect of any decrease therein; and that if these conditions continue, the deficit for 1918 and also for 1919 will be such as that the rate will be confiscatory. Judgment is demanded that the defendants be restrained from compelling the plaintiff to adhere to the statutory maximum. To that complaint the public service commission demurred, and the Appellate Division affirmed an order sustaining the demurrer and allowed an appeal to this court. *Held*, that the rates of public service corporations ought not to be so reduced by statute as to preclude a fair return, and that reduction below this is confiscation. Into every statute of this kind is to be read the implied condition that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. Any party aggrieved may invoke the judgment of the courts to restrain the enforcement of statutes which have become confiscatory. *Held*, further, that considered as a pleading and accepting it with all its reasonable inferences, unexplained and undenied, the allegations of the complaint make out a *prima facie* case of the denial of a just return.

2. The plaintiff sells electric current as well as gas. At the outset its charter confined it to the manufacture and sale of gas. The manufacture and sale of electric current was added at a later date by separate act, and the complaint alleges that the gas and electric operations of plaintiff have been and now are conducted as distinct and separate departments. *Held*, that under these and other acts, neither business is an incident of the other, nor has any relation to the other. Hence, the statement of a cause of action does not involve the disclosure of the earnings from sales of electricity.

3. There is by resort to this action in equity the avoidance of multiplicity of actions, the saving of waste and friction, the opportunity to analyze accounts so complex as to be unintelligible to juries, and protection against penalties and losses. The plaintiff's business is menaced and there is no adequate remedy at law, and equity, therefore, properly intervenes to save it from impairment in a single comprehensive action.

Municipal Gas Co. v. Public Service Comm., 186 App. Div. 933, reversed.

(Argued December 9, 1918; decided January 7, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 22, 1918, which affirmed an order of Special Term granting a motion by defendant, respondent, for judgment on the pleadings.

The following question was certified: "Does the complaint in this action state facts sufficient to constitute a cause of action against the defendant Public Service Commission, Second District."

Neile F. Towner for appellant. Chapter 227 of the Laws of 1907 is unconstitutional against plaintiff, appellant, because confiscatory and plaintiff, appellant, can properly raise such issue at this time. (*Willcox v. Consolidated Gas Co.*, 212 U. S. 41; *Smyth v. Ames*, 169 U. S. 466; *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, 134 U. S. 418; *Minnesota Rate Cases*, 213 U. S. 433; *People ex rel. Kings County Lighting Co. v. Willcox*, 210 N. Y. 479; *Covington, etc., Turnpike Co. v. Sanford*, 164 U. S. 578; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 143; *Denver v. Denver Union Water Co.*, 246 U. S. 194.) A doctrine that a statute can only be judged as to its constitutionality by the conditions existing at the time of its enactment would be intolerable and remove practically all the safeguards to property provided by the fundamental law of the land. (*Missouri v. Chicago, B. & Q. R. Co.*, 241 U. S. 539; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Smyth v. Ames*, 169 U. S. 466; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Northern P. R. Co. v. North Dakota*, 216 U. S. 579; *Louisville v. Cumberland Tel. & Tel. Co.*, 225 U. S. 430; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153; *Darnell v. Edwards*, 244 U. S. 70.) The test of the constitutionality of chapter 227 of the Laws of 1907, fixing the maximum rate for gas in the city of Albany, is by an action in equity, and the Supreme Court of this state

has jurisdiction. (*Missouri v. Chicago, Burlington & Q. R. Co.*, 241 U. S. 533; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466; *Des Moines Gas Co. v. City of Des Moines*, 238 U. S. 153; *Darnell v. Edwards*, 244 U. S. 570; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Detroit v. Detroit Citizens' S. R. Co.*, 186 U. S. 378-380; *Cleveland v. Cleveland City R. R. Co.*, 194 U. S. 517; *Ex parte Young*, 209 U. S. 123.)

Ledyard P. Hale, John J. McManus and Wilber W. Chambers for respondent. Under no circumstances now in existence is the plaintiff entitled to have a court adjudicate finally that chapter 227 of the Laws of 1907, which was admittedly constitutional when it was adopted and which has admittedly remained constitutional until some time during the year 1918, has suddenly become unconstitutional by reason of the increased costs of manufacturing and distributing gas due to war conditions. (*People v. Budd*, 117 N. Y. 1; *Vil. of Saratoga Spgs. v. Saratoga G., etc., Co.*, 191 N. Y. 123; *Matter of Quinby v. P. S. Comm.*, 223 N. Y. 244; *Matter of International Ry. Co. v. Rann*, 224 N. Y. 83; *People ex rel. Mun. Gas Co. v. P. S. Comm.*, 224 N. Y. 156; *Van Antwerp v. State*, 218 N. Y. 422; *Knoxville v. Water Co.*, 212 U. S. 1; *Willcox v. Cons. Gas Co.*, 212 U. S. 19.)

Arthur L. Andrews, Corporation Counsel (*John J. McManus* of counsel), for City of Albany, impleaded. The complaint does not state facts sufficient to constitute a cause of action for equitable relief. (*Matter of Rebbecca*, 51 Misc. Rep. 403; *San Diego L. & T. Co. v. National City*, 174 U. S. 739; *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Willcox v. Cons. Gas Co.*, 212 U. S. 19.) The complaint is fatally defective in that it fails to show or allege that the rate fixed by chapter 227 of the Laws

of 1907 has not yielded a reasonable average return upon the capital invested. (*Willcox v. Cons. Gas Co.*, 212 U. S. 19; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153; *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655; *People ex rel. Mun. Gas Co. v. P. S. Comm.*, 224 N. Y. 156; *People v. Budd*, 117 N. Y. 1; *B. U. Gas Co. v. City of New York*, 50 Misc. Rep. 450.) The complaint is defective in that it fails to show or allege that its entire gas and electrical operations in the city of Albany do not yield a reasonable average return. (*Pennsylvania R. Co. v. Tower*, 245 U. S. 6; *Minneapolis R. Co. v. Minn.*, 186 U. S. 257; *St. Louis R. Co. v. Gill*, 156 U. S. 567; *Minnesota Rate Cases*, 230 U. S. 383.) The rate fixed by chapter 227 of the Laws of 1907 can be increased only by the legislature. (*People ex rel. Municipal Gas Co. v. P. S. Comm.*, 224 N. Y. 156; *People v. Budd*, 117 N. Y. 1, 25; *Brooklyn Union Gas Co. v. City of New York*, 188 N. Y. 334.)

Merton E. Lewis, Attorney-General (*Wilber W. Chambers* of counsel), for Attorney-General, impleaded. The complaint does not state facts sufficient to constitute a cause of action because of the absence of an allegation that the return from its entire operations, gas and electrical, fails to give it a reasonable return on its investments. (*Smyth v. Ames*, 169 U. S. 466.)

William L. Ransom and *Harry M. Chamberlain* for Public Service Commission, First District, intervening. The complaint does not make out a cause of action for injunctive relief restraining the defendant public officers from performing their duty to enforce the statute. (*Lee v. O'Malley*, 140 App. Div. 595; *Wallack v. Society*, 67 N. Y. 23; *Matter of Sawyer*, 124 U. S. 200; *Fitts v. McGhee*, 172 U. S. 516.) The complaint fails to allege any facts, or to make any statements whatever, showing

or tending to show that chapter 227 of the Laws of 1907 was "unconstitutional," "void" or "confiscatory" at the time it was passed or at any time within the ensuing ten or eleven years. As a valid exercise of legislative power when enacted, the 1907 statute does not and cannot become "void" and "unconstitutional," ten or eleven years later, because of changed or temporary conditions. (*Norton v. Shelby County*, 118 U. S. 425; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 47; *People v. Dooley*, 171 N. Y. 74; *People ex rel. Farrington v. Mensching*, 187 N. Y. 8; *Matter of Markland v. Scully*, 203 N. Y. 158; *People ex rel. Hotchkiss v. Smith*, 206 N. Y. 231; *People ex rel. Woodruff v. Britt*, 206 N. Y. 246; *Van Antwerp v. State of New York*, 218 N. Y. 422; Cooley on Const. Lim. [7th ed.] 259.)

William P. Burr, Corporation Counsel (*John P. O'Brien* and *Vincent Victory* of counsel), for City of New York, amicus curiæ.

CARDOZO, J. In April, 1907, the legislature of this state enacted a statute which fixed the maximum charge for illuminating gas in the city of Albany at \$1 per thousand cubic feet (L. 1907, ch. 227). Violation of this act was to involve, for each offense, a forfeiture of \$1,000 to the People of the State. For many years, the plaintiff, a corporation, has sold gas to consumers in Albany. It has not exceeded in its charges the statutory maximum. But it asserts that changed conditions have made those charges inadequate, and that to compel adherence to the statute is to confiscate its property. At first, it sought relief from the Public Service Commission. Our ruling was that the commission had no power to supersede the statutory rate, and that for confiscation, however unlawful, there must be recourse to other remedies (*People ex rel. Municipal Gas Co. v. Public Service*

Commission, 224 N. Y. 156). This action was then begun. The complaint, verified August 20, 1918, alleges that during 1917 the net earnings were less than four per cent. upon the value of the property; that during the first six months of 1918, there was a deficit of over \$31,000; that during the last six months of 1918, the deficit will be greater; that the cost of material and of labor has risen with the war, and that there is no prospect of any decrease; and that if these conditions continue, the deficit for 1918 and also for 1919 will be between \$75,000 and \$100,000 a year. The defendants are the Public Service Commission for the second district, the city of Albany, the attorney-general of the state, and the district attorney of the county of Albany. Judgment is demanded that they be restrained from compelling the plaintiff to adhere to the statutory maximum. To that complaint, the Public Service Commission demurred, and moved for judgment on the pleadings. The Supreme Court by an order made November 2, 1918, sustained the demurrer, and gave judgment for the defendant, with leave to the plaintiff to amend. The Appellate Division affirmed the order, and allowed an appeal to this court.

(1) A challenge to our power meets us at the outset. We are told that the wrong, if there is any, has no remedy in the courts. There is no denial that the rates of public service corporations ought not to be so reduced by statute as to preclude a fair return, and that reduction below this is confiscation (*Smyth v. Ames*, 169 U. S. 466; *Minnesota Rate Cases*, 230 U. S. 352, 434; *Missouri v. Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533; *Rowland v. St. Louis & S. F. R. R. Co.*, 244 U. S. 106; *City & County of Denver v. Denver Union Water Co.*, 246 U. S. 178). But the argument is that a statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation, but none for confiscation

that results from changed conditions. We do not view so narrowly the great immunities of the Constitution, or our own power to enforce them. A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless (*Ex parte Young*, 209 U. S. 123, 147, 148). It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy; the coming years must tell whether the prophecy is true or false. All that we can say at the outset is that the power to regulate exists. The validity of its exercise depends upon the nicety of the adjustment between forecast and events. This is as true of a regulation which looks forward a year as of one which looks forward a decade or a century. In either case, with differences only of degree, there is a forecast of the future, which must be justified by results. Into every statute of this kind, we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. When the level is again attained, the duty of obedience revives. There would be no obscurity about this if the condition were expressed. It is no less binding because it is implied. The Constitution is the supreme law; and statutes are written and enforced in submission to its commands.

We turn to the precedents, and they give strength to our conclusion. We find no support in them for the principle, now pressed on us by counsel, that confiscation, if only it is avoided to-day, may be practised with impunity

to-morrow. On the contrary, through repeated decisions, there runs the consistent thought that, in controversies of this order, experience is the final test, that the courts must bide their time, and let the workings of the law decide (*Willcox v. Consol. Gas Co.*, 212 U. S. 19; *City of Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Northern Pac. Ry. Co. v. North Dakota*, 216 U. S. 579; *Cedar Rapids Gas L. Co. v. City of Cedar Rapids*, 223 U. S. 655, 670; *Missouri v. C., B. & Q. R. R. Co.*, 241 U. S. 533, 540; *Darnell v. Edwards*, 244 U. S. 564, 570; *Van Dyke v. Geary*, 244 U. S. 39). Bills to annul rates have been dismissed "without prejudice" while the outcome remained uncertain. Bills to annul the same rates have afterwards been sustained when the vision of results was clarified by the wisdom that follows the event (*Nor. Pac. Ry. Co. v. North Dakota*, 236 U. S. 585; *Missouri v. C., B. & Q. R. R. Co.*, *supra*, at p. 540). But even at such times, the courts have not forgotten the possibilities of the future. There has been no irrevocable annulment. Leave has been reserved to the appropriate representatives of the state to move to reinstate the suspended rates whenever changing circumstances may permit an adequate return (*Minnesota Rate Cases*, 230 U. S. 352, 473; *Missouri Rate Cases*, 230 U. S. 474, 508; *Missouri v. C., B. & Q. R. R. Co.*, *supra*). Nowhere is there the thought or the suggestion of the thought that the controversy ceases to be justiciable when confiscation is postponed. It is true, as counsel for the respondents urge, that the plaintiff has in such circumstances "the historic right" of petition to the legislature for relief against oppression. But that is not its only right (*Village of Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 150). It has the right, now also grown historic, to invoke, when constitutional immunities are threatened, the judgment of the courts.

(2) The questions remain whether confiscation is a permissible inference from the allegations of the complaint.

For more than nine years the statutory rate was adequate. Abnormal conditions brought about a change, and now, when the return is figured upon the value of the property, the outcome is said to be a deficit. The defendants argue that courts must pay some heed to the average results; that the prosperity of one year may atone for the adversity of another; and that confiscation does not ensue unless there has been an unreasonable extension of the period of dearth. That dearth does not signify confiscation unless unreasonably prolonged, may be assumed to be true (*Darnell v. Edwards*, 244 U. S. 564). The difficult thing is to determine where the line is to be drawn. Its location will vary with the nature of the business, the exigencies of the present, the chances of the future. There is no other test than the rule of reason and fairness (*Cedar Rapids Gas L. Co. v. City of Cedar Rapids*, 223 U. S. 655, 669). One cannot crowd the governing principle into any formula more definite. It will seldom be important that rates have been inadequate for a day or a week or a month. Fleeting losses may be suffered, and yet the balance sheet may show a profit. Prolong the loss, however, for a year, and you may reach and cross the danger line. It is by the average of the year that business commonly reckons its losses and its gains. On the other hand, there may be times when the average must be distributed over periods still longer.

We make no attempt to solve these problems now. We cannot solve them fairly till all the evidence is in. Then only can the changes and chances of the business be probed and measured. This case is here upon demurrer. The only question to be determined is the adequacy of a pleading. Considered as a pleading, and accepting it with all its reasonable inferences, we think it is sufficient. There was no need to go back of 1917, and disclose the earnings of earlier years. Their significance, if they have any, is solely as evidence; they have no place in a

complaint. We must presume, indeed, until the contrary is shown, that they were only reasonable in amount, for unfair and unreasonable rates are prohibited by statute (Public Service Commissions Law, secs. 65, 72; Consol. Laws, chap. 48). The plaintiff has the benefit of the presumption that it has kept within the law. The year 1917, therefore, is our point of departure. We have allegations that for that year the return has been unfair. We have allegations of a deficit for the first half of 1918, and of a prospective deficit of greater size for the second half of that year, and for the entire year to follow. We have allegations that the bounds of moderation have been passed, that confiscation has resulted and will indefinitely continue. Unexplained and undenied, these allegations make out a *prima facie* case of the denial of a just return. It may, of course, be impossible to prove them. The deficit, when analyzed, may be dissolved. The prophecies of evil may be the vain forebodings of timidity. The conditions engendered by the war may linger for months or years, or may vanish with the coming peace. Those questions are for the trial.

(3) The claim of confiscation is assailed along other lines. The argument is made that the plaintiff sells electric current as well as gas, and that the return from both branches of its business should appear in the complaint. At the outset, its charter confined it to the manufacture and sale of gas. The manufacture and sale of electric current was added in 1893. The complaint alleges that "the gas and electric operations of plaintiff have been and are now conducted as distinct and separate departments."

We think the statement of a cause of action does not involve the disclosure of the earnings from sales of electricity. That is not the business which this statute seeks to regulate. The act of 1907 (L. 1907, chap. 227) is limited to sales of gas. It makes no attempt to deal

with sales of electricity. That a company which sells gas may sometimes sell electricity is one of the accidents of commerce. The fortuitous conjunction of two unrelated functions or activities does not change the rate of profit to be derived from the fulfillment or pursuit of either. The defendants would have us say that the plaintiff, if it makes enough from electricity, must supply its gas for nothing. The legislature had not the purpose, if we assume that it had the power, to bring that result to pass. But the conclusion becomes the surer when we recall that there is another statute limiting the charge for electricity. The plaintiff must make no charge for electricity that is not reasonable and just (Public Service Commissions Law, sec. 65), and if it violates the prohibition, the Public Service Commission will hold it to its duty (sec. 72). But a reasonable price for electricity does not mean a price that will make amends for unprofitable sales of gas. The legislature did not intend that a burden should be lifted from consumers of one commodity in order that it might be cast upon consumers of the other (*Minnesota Rate Cases*, 230 U. S. 352, 421, 435). In fixing the price of electricity, the plaintiff is not entitled to recoup its losses upon sales of gas. For the same reason, in fixing the price of gas, it is not required to make allowance for the just and reasonable profit which is the limit of permissible return upon its sales of electricity. The distinction is often a close one between separate lines of business, which, though run by one person, must severally earn rewards (*Minn. Rate Cases*, *supra*; *Northern Pac. R. Co. v. North Dakota*, 236 U. S. 585, 595; *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605), and separate incidents or services of one composite business, which distributively may be unprofitable, if they are profitable collectively (*Penn. R. R. Co. v. Towers*, 245 U. S. 6; *People ex rel. N. Y. & Queens Gas Co. v. McCall*, 245 U. S. 345, 350; *Puget Sound Traction, L. & P. Co. v. Reynolds*, 244 U. S.

574, 580, 581). It is sometimes said that even then, discrimination must not be arbitrary, but must have some basis in the social welfare (*Penn. R. R. Co. v. Towers, supra*; *Nor. Pac. R. Co. v. Nor. Dakota, supra*; *Interstate Cons. St. Ry. Co. v. Mass.*, 207 U. S. 79, 86, 87). We need not go into such refinements now. In this instance, the legislature itself has drawn the distinction, and fixed the unit to be regulated. It has regulated the gas business as something separate and apart. It might have established a relation between the sale of gas and electricity. It has not chosen to do so. Neither business is an incident of the other. Neither has any relation to the other. Each bears its own burdens, and enjoys its own privileges.

(4) The final question is whether the remedy at law is exclusive of one in equity. The plaintiff has 26,000 customers in the city of Albany. Their rights cannot be adjudicated at law without endless litigation. They will not yield, unless under compulsion, to the demand for higher rates. If the plaintiff sues and wins, there will be delay and loss. If it sues and loses, even legal rates may be withheld (Public Service Commissions Law, sec. 75). Crushing also may be the penalties that will in that event be forfeited to the People of the state (L. 1907, chap. 227). Finally, there are complicated accounts to be unraveled, receipts and disbursements to be classified and distributed, the properties and transactions of a great business to be appraised and dissected. The defendants are public officers charged with special duties in the enforcement of the statute (*Ex parte Young*, 209 U. S. 123, 156). They assert a purpose to enforce it. With them may appropriately be joined representatives of the class of consumers, who will be bound by the decree (Code Civil Proced. sec. 448). In a single comprehensive action, the plaintiff seeks a judgment which will end the controversy forever.

We think the suit is well conceived. With notable consistency, it has been held, whenever like controversies have arisen, that equity will act (*Consol. Gas Co. v. City of N. Y.*, 157 Fed. Rep. 849, 881; *Willcox v. Consol. Gas Co.*, 212 U. S. 19; *Smyth v. Ames*, 169 U. S. 466, 517, 518; *Raymond v. Chicago U. Traction Co.*, 207 U. S. 20, 39, 40; *Ex parte Young*, 209 U. S. 123, 163, 164; *Minn. Rate Cases*, 230 U. S. 352; *Missouri Rate Cases*, 230 U. S. 474; *Missouri v. C., B. & Q. R. Co.*, 241 U. S. 533, 538). Many of the most distinctive features of equity jurisdiction are present (*Board of Supervisors Sar. Co. v. Deyoe*, 77 N. Y. 219, 226; *Nat. Park Bank v. Goddard*, 131 N. Y. 494, 502; *Emp. Eng. Corp. v. Mack*, 217 N. Y. 85, 94). There is the avoidance of multiplicity of actions. There is the saving of waste and friction. There is the opportunity to analyze accounts so complex and vast as to be unintelligible to juries (*Ex parte Young*, *supra*, at pp. 163, 164). There is protection against penalties that crush and against losses that cripple. Stress has been laid at times upon one element and at other times upon another. But resistance has yielded to their collective force.

We reach the same conclusion. Undoubtedly, the plaintiff has some remedy at law. The decisive point is that it is not as complete or efficient as the remedy in equity (*Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 12). Nothing to the contrary of our present holding was held in such cases as *Davis v. American Society P. C. A.* (75 N. Y. 362); *Delaney v. Flood* (183 N. Y. 323), and *Lee v. O'Malley* (140 App. Div. 595). In none of them was there present the risk of irreparable loss or of multiplicity of actions. This is no attempt by equity to restrain the enforcement of the criminal law, even if we were to assume that such an objection would invariably be fatal (*Ex parte Young*, at p. 162). The very purpose of the suit is a declaration of the plaintiff's rights which will enable it to shape its conduct in conformity to law.

It is another answer, though a narrower one, that the penalties are civil (*Consol. Gas Co. v. City of N. Y.*, *supra*; *Ten. House Dept. N. Y. v. McDevitt*, 215 N. Y. 160, 168; Code Civil Procéd. sec. 1962). The situation may be summed up in a sentence: The plaintiff's business is menaced along converging avenues of attack. Equity intervenes to save it from impairment, if not destruction.

There is, then, a remedy by injunction. But in thus holding, we do not suggest that an injunction issues as of course. It remains a discretionary remedy. The court may mould the decree in furtherance of justice. If it grants an injunction, it may limit the term of restraint. It may say that the injunction shall expire in a year or in six months or at any other stated time unless at or before such time the plaintiff shall satisfy the court that the rate is still inadequate. This will avoid the danger that the delays of litigation may continue the restraint of an injunction after the evil shall have vanished. But whatever the term of restraint, the privilege must at all times be reserved to the defendants to reinstate the suspended rates upon proof of changed conditions.

Our conclusion, therefore, is that a cause of action has been stated, and that the case must go to trial to be determined upon the merits.

In so ruling, we deal solely with the regulation of rates by statute. The decision has no bearing upon rates established by agreement as a condition of a franchise.

The order of the Appellate Division and that of the Special Term should be reversed, with costs in all courts; the demurrer overruled, with leave to answer on payment of costs within twenty days; and the question certified answered in the affirmative.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur.

Order reversed, etc.

BROADWAY PHOTOPLAY COMPANY, Respondent, v. WORLD FILM CORPORATION, Appellant.

Contract — damages — action for breach of contract to furnish first run of "feature" motion picture films — erroneous admission of evidence to prove damages — insufficient evidence.

1. The defendant undertook to supply the plaintiff with motion picture films for a stated period. The pictures were to be exhibited at the plaintiff's theatre and were to be of the order known as the first run of "feature" pictures. The contract having been broken by the defendant, the plaintiff unsuccessfully attempted to procure first-run pictures elsewhere. It has sued to recover profits alleged to have been lost, and a verdict in its favor has been unanimously affirmed. *Held*, that the plaintiff was improperly permitted to prove its receipts from other pictures, supplied by other producers, before the breach and after.

2. The jury was charged that the plaintiff was "limited to the difference in value between first-run feature pictures and second or third-run feature pictures, and not to the difference between feature pictures and other pictures." *Held*, that while the comparison must be between feature pictures and feature pictures of the first-run and feature pictures of later runs, there is nothing in the evidence to supply a basis for such comparison, and that the motion to strike out the evidence offered for that purpose was erroneously denied.

3. Experts were permitted to show their experience in other theatres in other sections of the city which were run under different conditions of competition. *Held*, that the comparison was misleading, and the admission of the evidence erroneous.

Broadway Photoplay Co. v. World Film Corp., 175 App. Div. 980, reversed.

(Argued December 12, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 20, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

I. Maurice Wormser and *Nathan Vidaver* for appellant. The judgment is contrary to law as plaintiff's prospective

profits upon new motion pictures never previously produced are entirely too problematical and conjectural to be the subject of recovery. The prospective profits were, therefore, not a proper element of damages, and the defendant's exceptions along this line were well taken, as the prospective profits were ascertainable by no legally probative means. Whether the new pictures would have succeeded in plaintiff's theatre, and to what extent, is entirely problematical, and plaintiff should not have been permitted to recover beyond its actual financial outlay. (*Bernstein v. Meech*, 130 N. Y. 354; *Cutting v. Miner*, 30 App. Div. 457; *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63; *Moss v. Tompkins*, 69 Hun, 288; 144 N. Y. 659; *Frohlich & Schwartz*, *The Law of Motion Pictures & The Theatre*, 149, 150; *Todd v. Keene*, 167 Mass. 157; *American Hungarian Pub. Co. v. Miles Bros.*, 68 Misc. Rep. 334.) Reversible error was committed in receiving the testimony of plaintiff's witness as to what happened in the Savoy Theatre and in other theatres under different conditions and at different scales of prices, since such testimony was *res inter alios acta*, incompetent, irrelevant and immaterial, and could only serve to mislead the jury and to confuse it. Such evidence was altogether collateral, and it was serious and reversible error to receive it. (*Moss v. Tompkins*, 69 Hun, 288; 144 N. Y. 659; *Todd v. Keene*, 167 Mass. 157; *Frohlich & Schwartz*, *The Law of Motion Pictures & The Theatre*, 153; *McKelvey on Evidence* [2d ed.], 169; *Chase's Stephen's Digest of the Law of Evidence* [2d ed.], 37.)

S. C. Sugarman for respondent. All of the rulings of the trial court, on the evidence offered, and upon the motions made by defendant, and on its requests to charge were proper, in view of the law governing the proof of damage in this case. (*Wakeman v. Wheeler*, 101 N. Y. 205;

Stevens v. Amsinck, 149 App. Div. 220; *Nash v. Thousand Islands*, 123 App. Div. 148; *Peltz v. Erchele*, 62 Mo. 171; *Hitchcock v. Knights*, 100 Mich. 40.) From the evidence in the whole case, the legitimate inference, amounting to a reasonable certainty, may be deduced that plaintiff's damage was the natural and proximate result of the breach of the contract. (*U. S. Trust Co. v. O'Brien*, 143 N. Y. 284; *Witherbee v. Meyer*, 155 N. Y. 446; *Stevens v. Amsinck*, 149 App. Div. 220; *Bates v. Holbrook*, 89 App. Div. 548.) There was evidence sufficient in law to permit the jury to indulge in reasonable conjectures and make probable estimates in order to approximate the damage occasioned by the breach of the contract. (*Wakeman v. Wheeler*, 101 N. Y. 105; *Stevens v. Amsinck*, 149 App. Div. 220; *Nash v. Thousand Islands*, 123 App. Div. 148; *Napier v. Spielman*, 54 Misc. Rep. 105; *Crittenden v. Johnson*, 7 App. Div. 258; *Taylor v. Bradley*, 39 N. Y. 129; *Bates v. Holbrook*, 89 App. Div. 557; *Benyakar v. Scherz*, 103 App. Div. 194; *Mortimer v. Otto*, 206 N. Y. 91; *Butler v. Manhattan*, 143 N. Y. 422; *Swain v. Schieffelin*, 134 N. Y. 471.)

CARDOZO, J. The action is for breach of contract. For a valuable consideration, the defendant undertook to supply the plaintiff with motion picture films one day in each week for fifty-two weeks beginning October 1, 1914. The pictures were to be exhibited at the plaintiff's theatre. They were to be of the order known as "feature" pictures. The line of division between feature pictures and others may not be easy to define, yet in practice those engaged in the business seem to have little difficulty in drawing it. But the plaintiff was not only to have feature pictures. It was to have the first run of them. This means that the pictures must not have been exhibited before in the immediate locality. The locality is described as the neighborhood of Broadway

from Ninety-sixth street to One Hundred and Eighth street in the city of New York. The contract was made in September, 1914. It was no sooner made than broken. The defendant found in one of the plaintiff's competitors a more profitable exhibitor. It refused to supply the plaintiff with first-run pictures. It offered to supply feature pictures, but they were of the second and later runs. They had already been exhibited at other theatres in the neighborhood. The plaintiff attempted to procure first-run pictures elsewhere, but with slight success. It has sued to recover profits alleged to have been lost; and a verdict for \$4,500 has been unanimously affirmed.

We think there was error fatal to the judgment in rulings upon evidence received as proof of damage.

The plaintiff was permitted to prove its receipts from other pictures, supplied by other producers, before the breach and after. This evidence was received under objection and exception, but subject to motion to strike out. The motion was later made, with adequate statement of the grounds, and an exception was noted to the denial. The point is fairly raised, and we must determine whether it was error to permit the evidence to stand. The plaintiff's theory is that a jury, analyzing its receipts, would discover uniformities and averages from which the profits of first-run pictures might be approximately measured. Little depends, it is said, upon the ultimate popularity of the pictures as disclosed by later runs. The bait of novelty suffices at the outset. Later runs may involve appeals to experience, but first runs are appeals to faith. The public accepts the offering upon the credit of the producer. Herein, it is argued, is the distinction between the moving picture and the drama. No one can compute in advance the earnings of unknown plays (*Bernstein v. Meech*, 130 N. Y. 354). But the argument is that the good-will built up by a producer will give to the first productions of his pictures

a uniform return. The certainty or uncertainty of the damages must vary, it is said, with the proved conditions of the business.

It is true, of course, that the conditions of a business affect the possibilities of proof and thus the measure of recovery. No formula can be framed, regardless of experience, to tell us in advance when approximate certainty may be attained. The rule of damages must give true expression to the realities of life. We do not need to determine what the plaintiff's rights would be if it were able to establish the uniformities which it asserts. The sufficient answer is that it has failed utterly to establish them. It did succeed in showing that "feature" pictures were more profitable than others. That is, indeed, the proposition to which the bulk of its evidence was directed. The difference, however, was not constant or even approximately constant. It was subject to the widest fluctuation. Quality counts, it seems, with pictures as with plays. But the plaintiff did not prove its damages by proving the superiority of feature pictures. The defendant was ready to supply feature pictures. They could have been obtained also, for all the evidence shows, from others. The comparison must be between feature pictures of the first run and feature pictures of later runs. The jury were so charged. They were charged that the plaintiff was "limited to the difference in value between first-run feature pictures and second or third-run feature pictures, and not to the difference between feature pictures and other pictures." But there is nothing in the evidence to supply a basis for the comparison. No law of averages, no constant or approximate uniformity of returns, can be gathered by induction from the sporadic and varying instances scattered through this record. The pictures of the first run are few in number. They disclose no semblance of equality in their returns when compared with one another. They disclose a

like diversity when compared with pictures of later runs. In this business, as in others, there are times when merit triumphs over novelty. Pictures acquire in one neighborhood a vogue that follows them into another. The indifferent show succeeds by force of the reputation of the actor. The results have all the endless variety of human tastes and fashions. To discover beneath these vagaries a unifying law of averages would be a task in any case. The task is hopeless here where only one day a week is covered by the contract. The plaintiff tries to avoid the difficulty by attributing to the defendant all the losses of the business from one week-end to another. The fanciful theory is advanced that the public will flock to poor shows on six days of the week if there is a good show on the seventh. There can be no stable foundation for a verdict that is built on such assumptions. Nothing but guesswork can place the damages at \$4,500 or any other fixed amount.

In these circumstances, there was error in the denial of the defendant's motion to strike out the evidence of the profits and losses of the business. It had been received under objection, and had no place in the record unless connected with the breach. The plaintiff was not required to prove its damages to the dollar (*Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205). It was required, however, to supply some basis of computation (*Bernstein v. Meech*, *supra*; *Todd v. Keene*, 167 Mass. 157; *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63); and this it did not do.

There were other errors of a like nature. Experts were permitted to show their experience in other theatres. They told how profits had risen fifty per cent when first-run pictures were exhibited to the exclusion of all others. These theatres were in other sections of the city. They were run under different conditions of competition, with rival houses across the street. Their display of first-run

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pictures was daily. Only once a week were such pictures exhibited by the plaintiff. The comparison was misleading, and the admission of the evidence erroneous (*Todd v. Keene, supra*; *Moss v. Tompkins*, 69 Hun, 288; *affd.*, 144 N. Y. 659).

The judgment should be reversed, and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur.

Judgment reversed, etc.

JAMES M. SCHLEY, JR., Appellant, v. MORNA C. ANDREWS,
Respondent.

Judgment — public policy — judgment confessed in favor of defendant to induce her to procure a divorce from plaintiff — such judgment is against public policy and illegal and cannot be enforced.

This action was brought to enjoin the collection of so much of a judgment as remains unpaid and for other relief. The plaintiff, in order to induce the defendant to procure a divorce, which was thereafter obtained, entered into an agreement by which he stipulated among other things that he would confess judgment for a substantial sum as collateral security for the payment of certain moneys to be paid by him from time to time for her support. After making several payments plaintiff refused further to carry out the agreement, defendant having in the meantime remarried. Thereupon she entered judgment upon the confession which she is taking proceedings to collect. *Held*, that the agreement and confession were illegal. (Domestic Relations Law [Cons. Laws, ch. 14], sec. 51.) They constituted a fraud upon the law, were against public policy, and could not be enforced by legal process, and judgment entered upon the confession occupies no better position. The general rule is that the action being in equity, and each of the parties being equally at fault, they should be left where the court finds them, but it applies only to contracts which have been fully performed. It does not apply where the contract remains in whole or in part executory since the agreement, confession and judgment must be considered together. The invalidity of one involves the invalidity of the others. In so far,

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however, as performance has been had the general rule should be applied, and the parties left where the court finds them, but to the extent that the judgment has not been collected, the court should interfere and prevent the arrangement being further consummated by the collection of the judgment.

Schley v. Andrews, 171 App. Div. 952, reversed.

(Argued October 21, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 27, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frederic R. Coudert and *Howard Thayer Kingsbury* for appellant. The agreement of September 1, 1911, and the confession of judgment securing it were illegal and void. (*Lake v. Lake*, 136 App. Div. 47; *Wolkovisky v. Rapaport*, 216 Mass. 48.) The appellant is entitled to relief so far as the contract is still executory. (Code Civ. Pro. § 1277; *G. P. & R. Mfg. Co. v. Mayor, etc.*, 108 N. Y. 276; *London & S. W. Bank, Ltd., v. White*, 162 App. Div. 739; 212 N. Y. 594; *Jaffray v. Saussmaa*, 52 Hun, 561; 117 N. Y. 648; *Nat. Park Bank v. Salomnn*, 23 N. Y. S. R. 566; *Carey v. Grant*, 59 Barb. 574; *Schank v. Schuchman*, 212 N. Y. 352; *Trebilcox v. McAlpine*, 62 Hun, 317; *Clark v. Scovill*, 198 N. Y. 279; *McCall v. McCall*, 54 N. Y. 541; *Matter of City of Buffalo*, 78 N. Y. 362.) The appellant is in truth and substance in the position of a defendant objecting to the abuse by the respondent of the court's process. (*Richardson v. Crandall*, 48 N. Y. 348; *Gray v. Hook*, 4 N. Y. 449; *Dewitt v. Brisbane*, 16 N. Y. 508; *Fields v. Brown*, 188 Ill. 111; *Given's Appeal*, 121 Penn. St. 260; *Heath v. Cobb*, 17 N. C. 187.)

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Herbert Noble for respondent. Plaintiff was properly denied relief, as he came into a court of equity with unclean hands. (*Lake v. Lake*, 136 App. Div. 50; *Creath v. Sims*, 46 U. S. 192; *Harms v. Stern*, 231 Fed. Rep. 648; *Fay v. Lambourne*, 124 App. Div. 245; *Smith v. Rowley*, 66 Barb. 502.) Appellant cannot attack the validity of the judgment or the sufficiency of his statement in the confession upon which the judgment was entered. (*Nusbaum v. Keim*, 24 N. Y. 325; *Frost v. Koon*, 30 N. Y. 428; *Union Bank v. Bush*, 36 N. Y. 631; *Harrison v. Gibbons*, 71 N. Y. 58.) The judgment against plaintiff and in favor of defendant is an executed contract. (*Gutta Percha & R. Mfg. Co. v. Mayor*, 108 N. Y. 276.)

McLAUGHLIN, J. This action was brought to enjoin the collection of so much of a judgment as remains unpaid and for other relief. The parties were formerly husband and wife. Unhappy differences having arisen between them, the plaintiff, in order to induce the defendant to procure a divorce, and if she did so to provide for her support, entered into an agreement by which he stipulated if she would procure a divorce he would pay her \$200 per month during her life; that he would have his life insured in the sum of \$20,000, payable to her upon his death in case she had not in the meantime again married; and as collateral security for the payment of the \$200 per month he would confess judgment for \$35,000. Defendant procured a divorce and thereafter the agreement, confession of judgment and policy of insurance were delivered to her. After making several payments he refused further to carry out the agreement, she having in the meantime remarried. Thereupon she entered judgment upon the confession for \$35,017.87, which according to the findings she threatens and is about to take proceedings to collect. Such threat she has already put into effect, according to a statement in respondent's

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brief, by issuing an execution upon the judgment, and the same having been returned wholly unsatisfied, she has obtained another execution under section 1391 of the Code of Civil Procedure, by which ten per cent of the income of a trust fund created for the benefit of the appellant is now actually being taken for the purpose of satisfying the judgment. At the trial the complaint was dismissed on the merits, and from a judgment entered to that effect the plaintiff appealed to the Appellate Division, where the same was affirmed, two of the justices dissenting, and he now comes to this court.

The agreement was entered into by the plaintiff for the sole purpose of inducing the defendant to procure a divorce. This the defendant at the time of the execution thoroughly understood, since the agreement provided that if she did not do so, it and the confession of judgment were to be of no effect. The confession, the court found, was intended as collateral security for the payment of the amounts stipulated in the agreement to be made. The agreement and confession were illegal. (Domestic Relations Law [Cons. Laws, ch. 14], sec. 51.) They constituted a fraud upon the law. They were against public policy, and could not be enforced by legal process. (*Wolkovisky v. Rapaport*, 216 Mass. 48.) The judgment entered upon the confession occupies no better position. It has for its support an illegal consideration, which the court does not recognize and which it never hesitates to condemn. To this extent I understand all the members of the court are in accord. Some of them, however, are of the opinion that the action being in equity, and each of the parties being equally at fault, they should be left where the court finds them. This is the general rule, but it applies only to contracts which have been fully performed. It does not apply where the contract remains in whole or in part executory. The agreement, confession and judgment must be considered together. They were each and all

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intended to accomplish a single purpose, namely, the payment to the respondent of \$200 per month during her life, provided she would obtain a divorce. The invalidity of one involves the invalidity of the others. In so far, however, as performance has been had the general rule should be applied, and the parties left where the court finds them, but to the extent that the judgment has not been collected, I think the court, out of its respect for the enforcement of the law, as well as on the ground of a wise and wholesome public policy, should interfere and prevent the arrangement being further consummated by the collection of the judgment. This view is supported by cases in other states. (*Fields v. Brown*, 188 Ill. 111; *Given's Appeal*, 121 Penn. St. 260; *Heath v. Cobb*, 17 N. C. [2 Dev. Eq.] 187.)

The plaintiff refuses to make further payments. The judgment, therefore, can only be collected by an execution in the hands of the sheriff. An execution is a process of the court (Code Civil Procedure, secs. 1364, 3343, subd. 2), and the sheriff is its officer to enforce the process. If the court refuses to interfere, then it inferentially, at least, places its seal of approval, not only upon the defendant's acts in collecting so much of an illegal judgment as remains unpaid, but it permits such collection to be made by its process and officer. I do not think this the court should do. If the defendant had obtained a divorce in this state, and the judgment had awarded her \$200 per month alimony, and she had again married, as she has here done, and the plaintiff had made a motion to be relieved from such payment, the court would have had to grant the motion. The statute so provides (Code Civil Procedure, sec. 1771), and while this statute has no direct bearing on the question being considered, it indicates by its enactment a legislative intent that as a matter of public policy a wife who has a husband with whom she is living should be supported by him and not

by one from whom she has been divorced. The defendant on the ground of public policy is in no better position to compel plaintiff to pay the \$200 a month than she would be if that payment were by virtue of a judgment dissolving the marriage contract. Indeed, she is in not nearly as good a position, because the judgment which she holds is clearly illegal, and ought not to be enforced.

My conclusion is that the execution which has been issued upon the judgment should be vacated, and the respondent enjoined from taking or attempting to take any further proceeding for the enforcement of the judgment. >

CRANE, J. (concurring). We are all agreed that the contract executed in this case was illegal and against public policy. The wife was given a confession of judgment upon the consideration that she should obtain a divorce from her husband. Having obtained the divorce she has entered judgment upon the confession and is proceeding to collect it through officers of the law. The husband made application to the Supreme Court to set aside the judgment because of the illegal nature of the transaction, but the motion was denied upon the ground that his relief was in equity. He has brought this action to set aside the judgment and to enjoin the execution issued thereon. The defendant is his wife, under her name by remarriage. Relief has been denied the plaintiff upon the principle that he has not come into equity with clean hands, and pleads his own moral turpitude. The question is: in matters dealing with the marital status should this general principle of equity outweigh a sound public policy by treating a confessed judgment as an executed contract.

If the wife had brought suit upon the contract for the money promised, the husband could have defended on the ground of the illegal nature of the consideration. If judgment in such action had been taken by default,

the husband, thereafter, could have moved the court to open the default and permit him to appear and plead the illegal consideration. Such application would not have been denied.

There is little difference between a judgment by confession and a judgment by default. The motion which the husband in this case made to set aside the judgment entered by confession should have been granted at least to the extent of permitting him to come in and defend. The evidence in such an action would have been the same as that given in this case, and the decision would have set aside the judgment absolutely.

The husband, however, has become the plaintiff, for reasons stated, and seeks the same relief which would have been given him had he been a defendant, or had his motion at Special Term been granted and he permitted to defend. Public policy has a stronger claim for action by the court in such a case as this than the "clean hand" equity rule has for non-action.

In *Bredin's Appeal* (92 Penn. St. 241) a petition was made to open a judgment entered by confession and permit the defendant to set up the illegality of the consideration which was the compounding of a felony. It was there stated: ,

"There is no difference in legal effect between a judgment confessed, or for want of appearance or plea, and a judgment on the verdict of a jury. The court in which the judgment is rendered will indeed open one of the former kind, and let the defendant into a defence in a proper case and upon equitable terms. * * *

"The entry of judgments, either by attorneys or prothonotaries, on judgment-notes, is very common. These though having the same effect as if on the verdict of a jury, while they stand, in fact, never were the results of adjudication. To hold that such a judgment entered on an immoral and illegal obligation, part of a transaction

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subversive of public interests, shall be deemed an executed contract, with absolute right in the plaintiff to judicial process for collection, would be shocking to every man's sense of justice. The argument is that the judgment shall stand, for the plaintiff need only show the note, and the defendant, as actor, will not be heard alleging his own and the plaintiff's turpitude in an application for opening the judgment. * * * The reason of the rule which allows a defendant to plead and prove the illegality of a contract in bar of a suit upon it, demands that he be heard in an application to open a judgment so confessed. His rights are of secondary importance, and he is not heard for their vindication. It is the duty of the court, on proper showing, to open such a judgment, to the end that there may be a trial as if suit had been originally commenced on the note or other obligation on which the judgment was entered."

I am of the opinion, therefore, that the complaint in this action should not have been dismissed, but that the relief prayed for should have been granted. And I go further than some of my associates who would simply enjoin the collection of the money, leaving the judgment to stand as an executed transaction. The judgment should be set aside in *toto*, and the wife enjoined from proceeding further under the contract. ✕

HISCOCK, Ch. J., CHASE and CUDDEBACK, JJ., concur with McLAUGHLIN, J.; CRANE, J., in opinion votes to reverse judgments and to order judgment vacating judgment in favor of defendant against plaintiff; COLLIN and HOGAN, JJ., vote or affirmance.

Judgments reversed so far as they dismiss complaint and judgment ordered vacating execution issued on judgment in favor of defendant against plaintiff and enjoining further proceedings for enforcement of said judgment, without costs.

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SAMUEL E. BOLLES, Appellant, v. WILLIAM SCHEER,
Respondent.

Master and servant — contract of employment — compensation of salesman consisting in part of share of net profits — inventory — charges of depreciation of stock against profits for year — effect of evidence that such charges were not made in good faith — order of reference cannot be reviewed upon appeal from final judgment.

1. In arriving at the net profits of a business for the purpose of determining the compensation of the plaintiff, a salesman, which compensation was in part dependent thereon, defendant charged against such profits sums which represented depreciation during the year of the market value of the stock of goods on hand. *Held*, that in view of the business practice of taking an annual inventory on which the goods on hand appear at the then prevailing value, this custom must be regarded as being contemplated by the parties when this contract was made.

2. Where there was evidence, as in this case, from which an inference might be drawn that the charges made for such depreciation were not made in good faith, it was the duty of the court to pass upon that question.

3. An order of reference is not one which necessarily affects the final judgment and hence cannot be brought up for review on an appeal from the final judgment in the action in which it was granted. (Const. art. VI, § 9; Code Civ. Pro. §§ 190, 191, 1316.)

Bolles v. Scheer, 173 App. Div. 967, reversed.

(Argued October 15, 1918; decided January 7, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 25, 1916, unanimously affirming a judgment in favor of defendant entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Robert H. Elder and *Otho S. Bowling* for appellant. In estimating net profits, depreciation charges are known and proper only in respect of property like machines,

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tools and plant, which are actually used in the course of production and manufacture, and which, by reason of such use, must be continually inspected and repaired, from time to time partially renewed, and ultimately replaced altogether, undergoing thus a diminution in value that adds to the cost of production. Depreciation is an operating expense. Such charges are unknown and never proper in respect of stock-in-trade as a provision against probable losses on sales, in future, which, if they ever occur, will be due to fluctuation in prices, and will be actually met, realized, and precisely determined to the very penny, by such sales of merchandise when they actually occur. (*Jennery v. Olmstead*, 36 Hun, 536; *affd.*, 105 N. Y. 654; *Emery v. Wilson*, 79 N. Y. 78; *Paine v. Howells*, 90 N. Y. 660; *Eyster v. Centennial Board*, 94 U. S. 500; *Daintry v. Evans*, 148 App. Div. 275; *Matter of Gerry*, 103 N. Y. 445; *Boisnot v. Wilson*, 109 App. Div. 569; *Amsden v. Dunham*, 78 App. Div. 33; *Thorn v. Breteuil*, 86 App. Div. 405; *Gray v. Darlington*, 82 U. S. 63; *Dent v. Tramways Co.*, 16 Ch. Div. 344.) Bolles and Scheer used the terms "profits" and "net profits" in their ordinary meaning, viz., the excess of the gross earnings over the expenditure defrayed in producing them, and had in mind "trading" or "current" annual profits. (*Union Pacific R. R. Co. v. U. S.*, 99 U. S. 402; *St. John v. Erie Ry. Co.*, 21 Fed. Cas. 167; 89 U. S. 136; *Mobile v. Tenn.*, 153 U. S. 486; *Jones v. Commonwealth*, 69 Penn. St. 137; *Vermont v. Vermont Central*, 50 Vt. 500; *Maloney v. Love*, 11 Colo. App. 288.)

Malcolm R. Lawrence, Parker V. Lawrence and Ephraim A. Karelsen for respondent. The entries were not "offsets from net profits" on account of "estimated depreciation," present or future, but were necessary and proper adjustments in connection with the preparation of the inventories and stock taking to ascertain the

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actual cost value to respondent of the merchandise on hand. No question as to "depreciation" is presented in this case. (*Jennery v. Olmstead*, 36 Hun, 536; 105 N. Y. 654.)

ANDREWS, J. The defendant is a dealer in jewelry. He made a contract with the plaintiff, who was a jewelry salesman, that during each of the years 1906 and 1907 he should pay the latter for services a salary, a percentage on the gross sales and a share in the net profits of the business. For those years Bolles drew as his share \$5,000 and \$1,000, respectively, but he claims that the net profits were larger than the sums reported to him; that he was unaware of the fact at the time, and he now seeks to recover the difference between the amount actually paid him and what he would have received if his share had been computed upon the proper basis, or substantially \$8,000.

The following inferences might fairly have been drawn from the evidence. Upon their face the books of the defendant showed about \$86,000 net profits for 1906 and \$41,000 for 1907. These amounts were arrived at by charging against the net profits for 1906 the sum of \$14,000 and against the net profits for 1907 the sum of \$59,000. These sums, it is said, represented depreciation during the year in the market value of the stock of goods on hand, and the referee seems to base his conclusion upon the proposition that the plaintiff offered no evidence that such a deduction was fictitious or unreasonable.

The claim of the plaintiff is that in any event such a deduction should not have been made. He says that in a case where the amount of net profits of the business accruing from year to year measure the compensation of an employee, such compensation is not to be increased or diminished because at the time when it is computed through fluctuations in the market, the market value of the merchandise or stock on hand has varied from its

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cost price, or the price at which it was inventoried at the beginning of the year. Under such a contract the inventory values of merchandise ordinarily taken at the beginning and end of each business year have no importance. Profits as understood in relation to such contracts are the result of a completed transaction, a purchase and a sale. Until the sale is finally made there is neither a profit nor a loss. In determining for the purposes of such a contract whether net profits have been made, the goods on hand need not be considered. As against the profits resulting from actual sales, there must be charged the expenses of the business and depreciation, using the word "depreciation" with reference to the physical condition of the property and as connoting a permanent physical change which reduced its value. There must be subtracted also any losses from business actually conducted. The result is the net profits upon which the employee's compensation is to be computed.

The majority of the court do not agree with this contention. They believe in view of the business practice of taking an annual inventory on which the goods on hand appear at the then prevailing value that this custom must be regarded as being contemplated by the parties when this contract was made.

We are all of the opinion, however, that such being the rule, the facts presented in this case require a determination by the referee of the question as to whether the charges of \$14,000 and \$59,000 respectively represented a fair allowance for depreciation for the years 1906 and 1907, and were made in good faith. There is evidence from which an inference to the contrary might be drawn.

The defendant's son, himself, had prepared the inventory. In this inventory he had set down presumably the actual value of the merchandise with due recognition of any existing depreciation. After making such an inventory, and thus affixing his own values, he

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further deducted a large sum. In regard to the \$14,000 item, the entry made under his direction states: "This is done in order to cover prospective decrease in price." Apparently the \$59,000 entry was made in the same form. At one time the defendant, himself, stated that these entries were to take care of future depreciations. An another time he stated it was a matter of charging depreciation on stock. At still another, the defendant's son in the latter's presence explained to the plaintiff that they were breaking up manufactured stock and so presumably the stock was less valuable than had been supposed, but this conversation was in 1910, some three years after the plaintiff became entitled to a percentage on the net profits of 1907.

In view of all these facts, the learned referee should have passed upon the question as to the good faith of the deductions as made.

We are asked to review an interlocutory order of the Appellate Division, affirming an order of reference. We have not the power to do so. No appeal may be taken as of right from such an order. (Constitution, article VI, section 9; Code of Civil Procedure, sections 190, 191.) The Appellate Division might have permitted such an appeal but it did not. (Code, section 190, as it stood in 1916.) But this is not an appeal from such an order. Under section 1316 of the Code, an appeal from a final judgment brings up for review any intermediate order specified in the notice of appeal which necessarily affects the final judgment and which has not already been reviewed. Therefore, assuming that the appellant could appeal as of right from the final judgment in this case, on such an appeal he could review any intermediate order necessarily affecting the final judgment. This appeal is not of right. It is an appeal taken under an order of Chief Judge BARTLETT, permitting the same under the provisions of subdivision 2 of section 191 of the Code. Such an order permits an

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appeal to be taken with the same force and effect as if the appeal were one of right, and when so taken section 1316 of the Code applies to it. But an order of reference under the authorities is not one which necessarily affects the final judgment. (*Van Marter v. Hotchkiss*, 4 Abb. Ct. App. Dec. 484; *Bloom v. National United Benefit Savings & Loan Company*, 81 Hun, 120; *affd.*, 152 N. Y. 114; *Roslyn Heights Land Co. v. Burrowes*, 22 App. Div. 540.)

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

HISCOCK, Ch. J., HOGAN, CARDOZO and POUND, JJ., concur; CHASE and McLAUGHLIN, JJ., concur in result, but hold that an order directing a reference in a case where the parties are entitled to a jury trial as matter of right necessarily affects the final judgment within the provisions of section 1316 of the Code.

Judgment reversed, etc.

In the Matter of the Claim of ANGELO DI SALVIO,
Respondent, against THE MENIHAN COMPANY et al.,
Appellants.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — claimant injured while visiting another workman across the room from place where claimant was employed — accident did not arise out of or in course of claimant's employment.

1. An award under the Workmen's Compensation Law can be sustained only where the court is able fairly to say that between the work for which the employee was engaged and the disputed act which led to the accident there was either naturally or as the result of some act of the employer or of custom a real relationship which brought the accident within the range of employment, and, therefore, it could be said to have arisen out of and in the course of the employment.

2. The claimant was in the employ of defendant which was engaged in the manufacture of shoes, and his duties consisted in marking soles

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with a rubber hand stamp. At the time of the accident claimant had crossed the room in which he was working to say good-bye to a fellow-employee who had been drafted and who would be required to leave work on account of the draft, and while leaning on the bench connected with the splitting machine which was being operated by his fellow-employee, his right arm was caught in an unguarded cog-wheel, and he sustained the injuries for which the award has been made. At the time that claimant walked across the room to greet his fellow-employee, he had finished the work that had been assigned to him and was waiting the arrival of more work. *Held*, that the accident did not in any degree arise out of or in the course of claimant's employment. (*Matter of Heitz v. Ruppert*, 218 N. Y. 148, followed; *Matter of Waters v. Taylor Co.*, 218 N. Y. 248, distinguished.)

Matter of Di Salvio v. Menihan Co., 184 App. Div. 922, reversed.

(Argued November 12, 1918; decided January 7, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 27, 1918, unanimously affirming an award of the State Industrial Commission made under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

Jeremiah F. Connor for appellants. The injury did not arise out of and in the course of the employment. (*Matter of Daly v. Bates & Roberts*, 224 N. Y. 126; *Matter of Gifford v. Patterson*, 222 N. Y. 4; *Matter of Sanger v. Locke*, 220 N. Y. 556; *Matter of De Fillippis v. Faulkenberg*, 170 App. Div. 153; 219 N. Y. 581; *Matter of Heitz v. Ruppert*, 218 N. Y. 148; *Matter of O'Neil v. Carley Heater Co.*, 218 N. Y. 414; *Spooner v. Detroit Saturday Night Co.*, 153 N. W. Rep. 657; *Bischoff v. American Car Foundry Co.*, 157 N. W. Rep. 34; *Matter of O'Toole*, 118 N. E. Rep. 303; *Hallet's Case*, 119 N. E. Rep. 673; *Matter of Betts*, 118 N. E. Rep. 551; *Brienen v. Wisconsin Public Service Com.*, 163 N. W. Rep. 182; *Mann v. Glastonbury Knitting Co.*, 96 Atl. Rep. 368; *Smith v. Crescent Belling & Packing Co.*, 37 N. J. L. 292; *Keene v. St. Clemenis' Press*, 7 B. W. C. C. 542.)

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Merton E. Lewis, Attorney-General (*E. C. Aiken* of counsel), for respondent. The injury to the claimant arose out of and in the course of his employment. (*Waters v. Taylor Co.*, 218 N. Y. 248; *Matter of O'Toole*, 118 N. E. Rep. 303; *Heitz v. Ruppert*, 218 N. Y. 148; *Matter of Hallet*, 119 N. E. Rep. 673; *Mann v. Glastonbury Knitting Co.*, 96 Atl. Rep. 368; *Moore v. L. V. R. R. Co.*, 217 N. Y. 627; *Sundine's Case*, 218 Mass. 1; *Matter of Von Ette*, 111 N. E. Rep. 696.)

HISCOCK, Ch. J. We are unable to see how the award in this case can be sustained. As found by the industrial commission the claimant was in the employ of defendant Menihan Company, which was engaged in the manufacture of shoes, and his duties consisted in marking soles with a rubber hand stamp. At the time of the accident he "had crossed the room in which he was working to talk to a fellow-employee who had been drafted and who would be required to leave work on account of the draft in a little while. Di Salvio wished to say good-by to the drafted man before he went to the front, and while leaning on the bench connected with the splitting machine which was being operated by said employee, the right arm * * * was caught in an unguarded cog-wheel, and he sustained the injuries * * * (for which the award has been made). At the time that * * * Di Salvio walked across the room to greet his fellow-employee, he had finished the work that had been assigned to him and was awaiting the arrival of more work."

In our opinion the accident did not in any degree arise out of or in the course of claimant's employment.

The courts have been liberal, as they should be, in so interpreting workmen's compensation statutes as to extend in many cases the relationship of employee to acts which seemed to be outside of the strict and ordinary lines of duty, as a basis for compensation. In accord-

ance with this policy it has been held that the accident arose out of and in the course of employment where an injury happened to an employee eating his dinner upon his employer's premises in accordance with express permission of the latter or usual custom (*Mann v. Glastonbury Knitting Co.*, 96 Atl. Rep. 368); or to a workman on a telegraph line who had taken refuge during a storm under a freight car and had gone to sleep (*Moore v. Lehigh Valley R. R. Co.*, 217 N. Y. 627); or to an employee injured while returning from a cabin on the premises of a railroad company to which employees were permitted to go to eat their meals (*Earnshaw v. Lancashire, etc., Rwy. Co.*, 5 W. C. C. 28); or to an employee injured by a falling wall while he was taking dinner on his employer's premises (*Blovelt v. Sawyer*, 6 W. C. C. 16); or to a lighterman, who, while waiting for the tide to ebb, went from his barge to a small boat a short distance therefrom to rest (*May v. Isom*, 7 B. W. C. C. 148); or to an employee who in accordance with a general practice left the composing room where he worked to go upon the roof and get fresh air on a hot night (*Matter of Von Ette*, 111 N. E. Rep. 696); or to an employee engaged in dumping cars who on a cold night during an interval of leisure for the purpose of protection laid down in a position where he was subsequently injured by a moving car (*N. W. Iron Co. v. Industrial Commission*, 160 Wis. 633); or even to an employee who was injured while getting down from a moving wagon where he properly belonged to pick up his pipe (*M'Lauchlan v. Anderson*, 4 B. W. C. C. 376); or to an employee who was injured in attempting to stop the runaway horse of his employer although his regular work was entirely unconnected with horses (*Rees v. Thomas*, 1 W. C. C. 9); or to an employee who as the result of reproof administered in his line of duty to a fellow-workman was struck by the latter in the eye (*Matter of Heitz, v. Ruppert*, 218 N. Y. 148).

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And this court perhaps went farther than any of these cases in extending the benefits of a compensation act when it held, as it did, in *Matter of Waters v. Taylor Company* (218 N. Y. 248) that an employee was acting within the scope of his employment so as to be entitled to the benefits of the act when he left his strict line of employment in the attempt to rescue another workman, technically in the employ of an independent contractor, from a danger which threatened his life. We thus held on the broad principle that as between the employee and the employer "It must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employees to stand still while the life of a fellow-workman working a few feet away was imperiled by such an accident as occurred here, and it seems to us that the accident arose out of his employment."

In each of these cases an award was sustained because the court was able fairly to say that between the work for which the employee was engaged and the disputed act which led to the accident there was either naturally or as the result of some act of the employer or of custom a real relationship which brought the accident within the range of employment, and, therefore, it could be said to have arisen out of and in the course of the employment.

But in the present case we search in vain for any such feature or relationship. There was no connection between the employment for which claimant was engaged, of marking soles, and his trip across the shop to say good-by to a fellow-employee. This act did not enable him either directly or indirectly, in any tangible sense, the better to perform his work, discharge his duties or carry forward the interests of his employer. It was not a natural incident to the work for which he was hired. It did not grow out of any emergency where he was

justified in taking an unusual step to protect his employer's interests. It was simply and solely the expression of a private desire and the consummation of a personal purpose. However natural and even commendable his act may have been it was neither beneficial to his employer nor to himself in the way of completing and performing his work.

The impulse may be, not unnaturally, to say in justification of it that an employee ought not to be compelled to stand idly at his post while waiting for work and that claimant's deviation from his proper course was only by a few feet. But these reasons will not stand analysis. So far as the first one is concerned, as has been pointed out, it would doubtless be possible for an employee temporarily out of work, and if he could do so without interfering with his duties, to seek some proper and available place for rest without destroying his relation of employee. And so far as concerns the second one, the conduct of an employee in a crowded machine shop is not to be measured by mere distances. In this case claimant went far enough to exchange a perfectly safe occupation for a condition of danger and accident. After all other considerations, the controlling and inevitable question remains whether it is part of the employment of an employee in a shop, hired to perform simple and fixed duties, to leave these and visit his fellow-workmen on errands of a purely personal character utterly unconnected with his regular duties. We think that the answer to this question is self-evident unless we are to extend the relation of employment for purposes of the Compensation Act over areas which will not only be new but difficult to define by any certain or logical boundaries.

The tests of such a claim as this were succinctly stated by Judge POUND in *Matter of Heitz v. Ruppert* (218 N. Y. 148, 152): "The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must

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be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work."

Claimant's injury does not survive these tests and his case comes within the principles of *Matter of O'Toole* (118 N. E. Rep. [Sup. Judicial Court of Massachusetts] 303), where it was held that accidental death occurring to a decedent who had temporarily left his employment to talk with a fellow-employee about personal matters could not be said to have arisen out of and in the course of his employment so as to become the basis for a claim; of *Reed v. Great West. Rway. Co.* (78 L. J. K. B. 31), where it was held that an engine driver who had left his engine while at rest and crossed a siding to receive from a friend a book unconnected with his duties, was not so engaged in his employment that an injury then received by him would be the basis for a claim under the Compensation Act; of *Bischoff v. American Car & Foundry Company* (157 N. W. Rep. [Supreme Court of Michigan] 34), where it was held that an employee who transgressed his instructions in order to assist a fellow-employee in the repair of a machine could not recover compensation for an accident then arising, although the injured employee thought that his acts were for the benefit of his employer; of *Smith v. Lancashire, etc., Ry. Co.* (1 W. C. C. 1), where a ticket collector having finished his duties tarried on the footboard of the car for a moment to speak to a passenger and was injured; of *Spooner v. Detroit Saturday Night Co.* (153 N.W. Rep. [Supreme Court of Michigan] 657), where an employee who was injured while conveying some fellow-employees in an elevator to their work as a favor to them and which act was outside of his line of duty was denied workmen's compensation; of *Matter of Gifford v. Patterson, Inc.* (222 N. Y. 4), where it is stated that "when an employee is injured through some act of his own, not an incident to his employment,

and not authorized or induced by his employer in connection with his employment, the injury does not arise out of and in the course of his employment within the meaning of * * * the Workmen's Compensation Law."

We think that the order of Appellate Division and award of the industrial commission must be reversed and the claim dismissed, with costs in this court and in the Appellate Division against the industrial commission.

COLLIN, CUDDEBACK, HOGAN and McLAUGHLIN, JJ., concur; CHASE and CRANE, JJ., dissent.

Order reversed, etc.

Matter of ELLEN MCINERNEY, Respondent, v. BUFFALO AND SUSQUEHANNA RAILROAD CORPORATION, Appellant.

STATE INDUSTRIAL COMMISSION, Respondent.

Workmen's Compensation Law — claimant injured while walking upon tracks in railroad yard instead of adjacent and convenient highway — when accident did not arise out of and within course of employment.

The deceased for whose death compensation is claimed was in the employ of defendant as a car inspector in one of its yards; he was accustomed to go for his dinner to his home, which was not on the defendant's premises, on week days taking the highway and on Sundays walking on the defendant's right of way in order to avoid exposing himself in his working clothes to the view of people on the highway; he took this route without objection on the part of his employer and in so doing violated no enforced rule; on Sundays he received pay for eleven hours which included the one which he was permitted to take for dinner; on the Sunday in question as he was thus going to dinner he received injuries causing death by falling from a trestle which was within the limits of the railroad yards in which yards he performed certain of his duties. The deceased on the occasion in question traveled more than half a mile from the yard where he stopped work before reaching the trestle where he fell, whereas it was a much shorter distance to the highway which he ordinarily used for this trip, and the route which he did take on this occasion before reaching the trestle crossed two streets which would have led him home. *Held*, that the findings of the specific circumstances which gave rise to the

accident are to control rather than the general conclusion drawn from them by the commission, and that tested by the general character of the undertaking in which the deceased was engaged at the time of the accident, the latter did not arise in the course of or spring out of his employment.

Matter of McInerney v. B. & S. R. R. Corp., 184 App. Div. 917, reversed.

(Argued November 12, 1918; decided January 7, 1919.)

APPEAL, by promission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered May 7, 1918, unanimously affirming an award of the state industrial commission made under the Workmen's Compensation Law.

The facts, so far as material, are stated in the opinion.

Thomas R. Wheeler for appellant. The accident to claimant's husband did not arise out of and in the course of his employment; the claim should, therefore, have been dismissed. (*Devoe v. New York State Railways*, 218 N. Y. 318; *McCabe v. Brooklyn Heights R. R. Co.*, 177 App. Div. 107; *Bylow v. St. Regis Paper Co.*, 179 App. Div. 555; *Ames v. N. Y. C. R. R.*, 178 App. Div. 324; *Manor v. Pennington*, 180 App. Div. 130; *Gifford v. Patterson*, 222 N. Y. 4; *Murphy v. Ludlum Steel Co.*, 182 App. Div. 139; *King v. State Ins. F. & S. O. Co.*, N. Y. L. J. Sept. 25, 1918; *Reed v. Great Western Ry.*, 2 B. W. C. C. 109; *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125; *Bates v. Roberts*, 224 N. Y. 126; *Matter of Redner v. Faber & Son*, 223 N. Y. 379; *Hotaling v. S. O. Co.*, 6 S. D. Rep. 308; *Peers v. De Carion & Co.*, 5 S. D. Rep. 425; *McGuire v. B. H. R. R. Co.*, 10 S. D. Rep. 631; *Sokal v. Clyde S. S. Co.*, 6 S. D. Rep. 339; *Berg v. Great Lakes Dredge & Dock Co.*, 173 App. Div. 82; *Pope v. Merritt Chapman Derrick & Wrecking Co.*, 177 App. Div. 69; *Pier-son v. Interborough Rapid Transit Co.*, 102 Misc. Rep. 130.)

Merton E. Lewis, Attorney-General (*E. C. Aiken* of counsel), for respondent. The accident to the deceased

employee arose out of and in the course of his employment. (*Gane v. N. H. Colliery Co.*, 2 B. W. C. C. 47; *McKee v. G. N. Ry. Co.*, 1 B. W. C. C. 165; *Cremins v. Guest, Keen & Nettleford*, 1 B. W. C. C. 160; *Matter of Littler v. Fuller Co.*, 223 N. Y. 369; *Redner v. Faber & Son*, 223 N. Y. 379; *Grieb v. Hammerle*, 222 N. Y. 382; *Di Paolo v. Crimmins Cont. Co.*, 219 N. Y. 38.)

HISCOCK, Ch. J. What we regard as the determinative facts which have been found in this case, aside from formal ones, are to the effect that the deceased workman was in the employ of defendant as a car inspector in one of its yards; that he was accustomed to go for his dinner to his home, which was not on the defendant's premises, on weekdays taking the highway and on Sundays walking on the railroad right of way in order to avoid exposing himself in his working clothes to the view of people on the highway; that he took this route "without objection" on the part of his employer and in so doing "violated no enforced rule;" that on Sundays he received pay for eleven hours which included the one which he was permitted to take for dinner; that on the day in question, which was Sunday, as he was thus going to dinner he received injuries causing death by falling from a trestle which was "within the limits of the railroad yards in which yard he performed certain of his duties."

The Industrial Commission further found as a conclusion that the accident to deceased "arose out of and in the course of his employment," but since we have findings of the specific circumstances which gave rise to the accident, these are to control rather than the general conclusion drawn from them by the commission.

Tested by the general character of the undertaking in which the deceased was engaged at the time of the accident, the latter did not arise in the course of or spring out of his employment. Such a trip of an employee

as he was taking is not under ordinary circumstances part of the employment. It is true that it has been held many times that where an employer requests or customarily permits his employees to eat their meals upon his premises or in some place provided for them, the temporary interruption to their work thus caused will not be regarded as terminating their character as employees or as excluding them from the protection of such a law as our Compensation Act. (*Highley v. Lancashire, etc., Ry. Co.*, 9 B. W. C. C. 496, 501; *Blovelt v. Sawyer*, 6 W. C. C. 16; *Morris v. Lambeth Borough Council*, 8 W. C. C. 1.) This view is in accordance with the rule which prevailed in negligence cases. (*Heldmaier v. Cobbs*, 195 Ill. 172; *Riley v. Cudahy Packing Co.*, 82 Neb. 319; *Thomas v. Wis. Cent. Rwy. Co.*, 108 Minn. 485.) But no case has been cited or found where an employee going for such a purpose to his home or other place selected by him a substantial distance away from the "ambit" of his employment and from the employer's premises has been regarded as so engaged in the latter's business that an accident then happening to him would be held to be one arising out of and in the course of his employment. On the contrary it has been uniformly held that it did not so arise. (*Boyd on Workmen's Compens.* § 481; *Ruegg on Employers' Liability & Workmen's Compens.* 377; *Brice v. Lloyd*, 2 B. W. C. C. 26; *Hoskins v. Lancaster*, 3 B. W. C. C. 476, 478, 479; *Hills v. Blair*, 182 Mich. 20.) Such an act of the employee lies outside of his employment within the fair application of the principles which were laid down in *Matter of De Voe v. N. Y. S. Rways.* (218 N. Y. 318) and does not come within the rule applied in *Matter of Littler v. Fuller Co.* (223 N. Y. 369), where the transportation in the course of which the injury arose was by the contract of hiring expressly "brought within the scope of the employment." This view is also in accord-

ance with the decisions in negligence cases. (*Wilson v. C. & O. Rway. Co.*, 130 Ky. 182; *Moronen v. McDonnell*, 143 N. W. Rep. [Sup. Ct. Mich.] 8.)

But while not seeming to dispute this general proposition the attorney-general invokes another rule for the purpose of sustaining the present award. This rule is the one that employment for the purposes of a workmen's compensation act, such as ours, does not commence or end at the instant an employee puts his hand to or takes it from his actual work, but includes a reasonable time and space through which he is approaching or leaving his work, and it is argued that under this principle decedent's relation of employee as he departed to his dinner continued down to the point of his accident and thus gave to the latter the necessary character to make it a basis for compensation. (*Guastelo v. Mich. Cent. Rway. Co.*, 160 N. W. Rep. [Sup. Ct. Mich.] 484; *Hoskins v. Lancaster*, *supra*; *Gane v. Norton Hill Colliery Co.*, 2 B. W. C. C. 42, 47.)

We do not think that the findings sustain this argument. As already stated they simply show that at the time the deceased fell he was still "within the limits of the railroad yards in which yard he performed certain of his duties," there being nothing to indicate how far he had proceeded from where he stopped work. The fact that an employee is on the "premises" of his employer when those premises consist of a railroad right of way or yards does not have the significance which it naturally would have in the case of an ordinary manufacturing plant. We know that such rights of way extend indefinitely and that such yards are of no standard size but run from small areas to large tracts extending over many miles. Therefore, to say that the deceased was still within the yards where he performed some of his duties in no manner indicates that he was still within that reasonable distance of the point of cessation of his

actual work where he would be protected. Nor do we think that this distance and protection would be indefinitely and as matter of course extended simply because the employer permitted him for his own purposes to travel on the railroad right of way instead of taking the usual and safe course by the highway.

Even farther than this, if we should assume that we might look to the evidence in the attempt to imply a finding that would uphold the award, the attempt would in my opinion fail. This evidence would show that the deceased on the occasion in question traveled over 3,000 feet, considerably more than half a mile, from the yard where he stopped work before reaching the trestle where he fell, whereas it was a much shorter distance to the highway which he ordinarily used for this trip, and although the route which he did take before reaching the trestle crossed two streets which would have led him home. Under such circumstances we do not think that it would have been permissible for the Industrial Commission to find that the deceased at the time of his accident was still within that reasonable distance which the law gave to him for departure from his work.

As has been suggested it does not seem that the mere fact that the employer suffered the employee for reasons of his own to travel home by the right of way instead of by the usual and safe highway should operate to extend the distance through which the employee might travel on an errand of his own before losing his character of employee, and if the deceased while traveling upon the highway and when distant half a mile from his place of work had been injured we suppose it would hardly be suggested that the accident arose in the course of his employment. In the cases which have been called to our attention where the claim of an employee has been sustained under the rule which we have discussed the accident happened in close proximity to the place of

work and while the employee was on the premises of the employer and departing from or approaching his work by a way which had been furnished or adopted by the employer as a usual and customary one. (*Gane v. Norton Hill Colliery Co.*, *supra*; *Hoskins v. Lancaster*, *supra*; *M'Kee v. Great North. Rway. Co.*, 1 B. W. C. C. 165. See, also, *Olsen v. Andrews*, 168 Mass. 261, 263.)

On the other hand the case which of all others is most analogous in its facts to the present one is opposed to an award. (*Hills v. Blair*, 182 Mich. 20.) In that case the deceased workman of the defendant started from a hand car house where the crew stopped at noon to go to his home for dinner. He traveled on the railroad right of way, although a short distance from the starting point a highway crossed the track and thence ran parallel with it. At a distance of 950 feet from the starting point he was accidentally killed by collision with a train. Under a statute like our own on this point the Industrial Accident Board held that the deceased was still in the employment of the defendant under the rule which has been stated and made an award. The Supreme Court, however, reversed this action holding in effect that the deceased could not be regarded as within the rule and still in the employment of the defendant at the time the accident happened. (See, also, *Caton v. Steel Co.*, 39 Scot. L. R. 762; *M'Laren v. Caledonian Rway. Co.*, 5 B. W. C. C. 492; *Walters v. Staveley Coal, etc., Co.*, 4 B. W. C. C. 303; *Gilmour v. Dorman, Long & Co.*, 4 B. W. C. C. 279.)

For these reasons we think the order of the Appellate Division and the award of the State Industrial Commission must be reversed and the claim dismissed, with costs in this court and in the Appellate Division against the Commission.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Order reversed, etc.

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Statement of case.

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WAHLE-PHILLIPS COMPANY, Appellant, v. MARY A.
FITZGERALD, Respondent, Impleaded with Others.

Mechanics' liens — fixtures — Lien Law — when electric lighting fixtures furnished and used in the equipment of an office building are included in the "permanent improvement of real property" within meaning of the Lien Law.

1. The General Construction Law (§ 95) requires the courts to construe the Lien Law as a continuation of the prior law and not as a new enactment, and the Lien Law itself provides (§ 23) that it is to be construed liberally to secure its beneficial interests and purposes.

2. Electric lighting fixtures furnished and used for the purpose of equipping an office building and the labor performed in installing them are included in the term "permanent improvement of real property" as used in sections 2 and 3 of the Lien Law (Cons. Laws, ch. 33; L. 1909, ch. 38) as it read in the year 1910.

Wahle-Phillips Co. v. Fitzgerald, 173 App. Div. 129, reversed.

(Argued November 22, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 22, 1916, affirming a judgment of Special Term which denied part of plaintiff's claim to a mechanic's lien for electric light fixtures and directed foreclosure of other liens.

The facts, so far as material, are stated in the opinion.

John A. Dutton for appellant. All lighting fixtures of every description were included in the term, "improvement of real property," contained in the Lien Law in force at the time the lien herein was filed, because that law was, in effect, a re-enactment of the earlier Lien Law, and was intended to be as broad as, and to include all articles covered by, the earlier law, and such earlier law expressly included lighting fixtures of all kinds and in all buildings as the subject of a mechanic's lien. (*People v. Buller*, 125 App. Div. 384; *Gimmer v. Tenement House Dept.*, 134 App. Div. 902; *Lewkowicz v. Queen*

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Points of counsel.

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Aeroplane Co., 154 App. Div. 150; *Tenement House Dept. v. Moeschon*, 179 N. Y. 325; *Riggs v. Palmer*, 115 N. Y. 506; *Schaghticoke Powder Co. v. G. & J. Ry. Co.*, 183 N. Y. 306.) The lighting fixtures in the case at bar became a part of the realty and were, by reason thereof, necessarily an improvement of the real property and within the provisions of the statute. (*Berliner v. Piqua Club Assn.*, 32 Misc. Rep. 470; *Potter v. Cromwell*, 40 N. Y. 287; *Snedeker v. Warring*, 12 N. Y. 170; *Gross v. Jackson*, 6 Daly, 463; *Bronson on Fixtures*, 35, 45, 46, 69-71, 103, 133, 134; *McCrea v. Bank of Troy*, 66 N. Y. 489; *N. Y. Security Co. v. Saratoga Gas Co.*, 88 Hun, 591; *Central Union Gas Co. v. Browning*, 146 App. Div. 783.) Whether or not the lighting fixtures became part of the realty, their manufacture and installation in the building constituted the performance of labor and the furnishing of materials for the improvement of real property within the meaning and intent of the statute in question. (*Schaghticoke Powder Co. v. G. & J. Ry. Co.*, 183 N. Y. 306; *Jackson v. Paterno*, 128 App. Div. 474; *Berlinger v. Macdonald*, 149 App. Div. 5.)

Thomas D. Thacher, Leland B. Duer and Winthrop E. Dwight for respondent. The installation of the office fixtures was not a permanent improvement of real property within the meaning of sections 2 and 3 of the Lien Law. (*Caldwell v. Glazier*, 138 App. Div. 826; *Wahle-Phillips Co. v. Fifty-ninth St. Madison Ave. Co.*, 153 App. Div. 17; 214 N. Y. 684; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; *N. Y. Life Ins. Co. v. Allison*, 107 Fed. Rep. 179; *Manning v. Ogden*, 70 Hun, 399; *Smusch v. Kohn*, 22 Misc. Rep. 344; *Cosgrove v. Troesch*, 62 App. Div. 123; *Condit v. Goodwin*, 44 Misc. Rep. 312; 107 App. Div. 616; *Shaw v. Lenke*, 1 Daly, 487; *Lawrence v. Kemp*, 1 Duer, 363.) The fact that lighting fixtures are customarily furnished to tenants in New

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York city, and that such fixtures are essential in the use of an office building, does not make such fixtures a "permanent improvement of real property." (*Central Union Gas Co. v. Browning*, 210 N. Y. 10; 146 App. Div. 790.)

POUND, J. This is an action to foreclose a mechanic's lien. The only question presented on this appeal is whether electric lighting fixtures furnished and used for the purpose of equipping an office building and the labor performed in installing them are included in the term "permanent improvement of real property" as used in sections 2 and 3 of the Lien Law (Cons. Laws, ch. 33; L. 1909, ch. 38) as it read in the year 1910. Gas and electric fixtures, as ordinarily attached to a house or other building for use, are, in actions between grantor and grantee, landlord and tenant and mortgagor and mortgagee, held to be personal property. (*McKeage v. Hanover Fire Insurance Co.*, 81 N. Y. 38.) It has been said that they no more constitute part of the realty than would pictures supported by fastenings driven into the wall. Technically, then, they are not permanent improvements to real property. We may, however, take judicial notice of the fact that such fixtures often pass with real property bought or leased, and are unlike articles of furniture, pictures, carpets and hangings which are easily and customarily moved. They resemble rather furnaces and ranges which are built in and left as a part of the property itself, passing with it from vendor to vendee and from landlord to tenant. The legislature by chapter 316, Laws of 1888, and chapter 673, Laws of 1895, which amended the Mechanics' Lien Law (L. 1885, ch. 342) specifically enumerated such fixtures as proper subjects of a lien upon the real property to which they were attached. Thus the law remained until the enactment of the Lien Law as reported by the commissioners of statutory revision (Ch. 49 of the General Laws, being L. 1897, ch. 418), which was, as stated in

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the report of the commissioners, "a revision of all the existing statutes relating to mechanics' liens on real property." They further set forth, in explanation of their purpose, that "the underlying principle of all legislation of this character is that a person who, at the request, or with the consent, of the owner of real property, enhances its value by furnishing materials or performing labor for the improvement thereof, should be deemed to have acquired an interest in such property to the extent of the value of such materials or labor. This principle should be applied generally to improvements of real property. It is not necessary, therefore, to detail the particular kinds of improvements for which the lien will exist, as has been done in the act of 1885. By defining the terms 'improvement,' 'owner,' 'real property,' etc., in a broad and comprehensive manner, it will be possible, by the use of such terms to omit superfluous words and expressions formerly used to apply generally the principle above enunciated. We have not attempted in the revision to radically change the existing law, as contained in the general act of 1885." (Report Commissioners of Statutory Revision.) This Lien Law was re-enacted in the present Lien Law (Consolidated Laws, ch. 33; L. 1909, ch. 38). It makes no provision in terms in favor of those who furnish lighting fixtures used in improving or equipping a building, and the Appellate Division holds that the amendment of the act of 1885 for their protection was cut out in order to deny a lien where one had previously been given. (*Caldwell v. Glazier*, 138 App. Div. 826.) It is difficult to reach that conclusion. The General Construction Law (§ 95) requires us to construe the Lien Law as a continuation of the prior law and not as a new enactment. The Lien Law itself provides (§ 23) that "this article is to be construed liberally to secure the beneficial interests and purposes thereof," and the courts have generously applied this

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rule of construction. (*Schaghticoke Powder Co. v. Greenwich & J. Ry. Co.*, 183 N. Y. 306, 311.) We must give the words "improvement of real property" a broad and comprehensive meaning.

Manifestly it was not the intention of the revisers to curtail the old law or to withdraw from its protection any class of labor, services or materials which had previously been included therein. "Such a construction ought to be put upon a statute as will best answer the intention the makers had in view." (*Riggs v. Palmer*, 115 N. Y. 506, 510.) As between materialman and contractor and owner, lighting fixtures may, with propriety, be deemed to constitute an improvement of real property in a sense that does not exist with fixtures more temporary in their character, not commonly leased with the realty but commonly furnished and removed by the tenant as he furnishes and removes his rugs, pictures, desks and chairs. When, and only when, the building is thus equipped does it become complete for the use for which it was designed.

The legislature by Laws of 1914, chapter 506, has amended section 2 of the Lien Law by again including specifically in the definition of the term "improvement" apt words to protect those who furnish and install lighting fixtures. By denying the plaintiff the relief it seeks we would be disregarding the weightier purposes of the law, its history and the beneficent intention of the revisers to avoid the draftsman's sin of prolixity to give the defendants the benefit of an obvious oversight.

The judgment of the Appellate Division and that portion of the judgment of the trial court appealed from should be reversed and judgment ordered in favor of the plaintiff establishing its lien, with costs to the appellant in all courts.

HISCOCK, Ch. J., CUDDEBACK, CARDOZO, CRANE and ANDREWS, JJ., concur; COLLIN, J., not voting.

Judgment accordingly.

CHURCH E. GATES & COMPANY, INCORPORATED, Respondent, *v.* NATIONAL FAIR AND EXPOSITION ASSOCIATION et al., Defendants, EMPIRE CITY RACING ASSOCIATION, Appellant, and WRIGHT OGDEN COMPANY, INCORPORATED, et al., Respondents.

Mechanic's lien — landlord and tenant — validity of lien filed against property of landlord for materials furnished and work done in improvements to property made by tenant — when designation of corporate owner of property by original name instead of new corporate name not a misnomer — liens filed against stockholder and director of corporation cannot be enforced as liens against the corporation — laborers cannot enforce liens for unpaid checks delivered to and held by bona fide holders.

1. Where the trial court has found, in an action to foreclose a mechanic's lien (Cons. L. ch. 33), that the improvements were made with the consent and knowledge of the owner and such finding has evidence to sustain it, a judgment enforcing the lien must be sustained.

2. Where in liens filed against real property owned by the "Empire City Racing Association" the name of the owner was stated as the "Empire City Trotting Club," which was the original name under which the owner was incorporated, and the name under which most of its property was acquired, but before the time involved the name had been legally changed to "Empire City Racing Association," such misnomer, although defective, was not a substantial "misdescription of the true owner," and hence the lienors, who gave the name of the owner of the real property as "Empire City Trotting Club," should be deemed to have substantially complied with the Lien Law.

3. Where liens sought to be enforced herein were filed against an officer and stockholder of the "Empire City Racing Association" and actively connected with its management, but who had no personal interest in its real property as an owner, it must be held that this was not a substantial compliance with the statute.

4. Liens filed and docketed against "Empire City Racing Association and" another as owners are valid as against the association and were not made valueless and ineffectual by the further docket of said liens as against such other person, who was an officer of the association, as an alleged owner. (Lien Law, § 10.)

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Points of counsel.

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5. Where worthless checks for work on the improvements were given by the lessee to laborers who, not knowing the checks were worthless, indorsed and delivered them in payment of bills to others who still hold them, such laborers cannot urge their right to file and sustain a lien for their labor accounts so far as they were canceled by the checks so used by them. Such checks still outstanding in the hands of *bona fide* holders represent an indebtedness against the lessee and the holders of the checks have a valid claim against the exposition association.

6. The trustee in bankruptcy of the lessee holds his title subject to the liens filed by materialmen and laborers which were filed within the time prescribed by statute.

Gates & Co. v. Nat. Fair & Exposition Assn., 172 App. Div. 581, modified.

(Argued November 26, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 19, 1916, affirming a judgment in favor of plaintiff and defendants, respondents, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joshua M. Fiero, Joshua M. Fiero, Jr., and John H. Rogan for appellant. There was no owner's request or consent to the improvements, which is the basis of the liens, and, in fact, there was a written dissent by the owner to the improvements or alterations, unless security was furnished by the lessee. (*Hartley v. Murtha*, 36 App. Div. 196; *Mitchell v. Dunmore Realty Co.*, 126 App. Div. 829; *Powers v. Schlicht Power Co.*, 23 App. Div. 380; *Orvis v. Warner & Co.*, 75 App. Div. 463; *Mathews v. Hardt*, 79 App. Div. 570; *Miners & Merchants Bank v. Ardsley Hall Co.*, 113 App. Div. 194; *Brigger v. M. R. F. Assn.*, 79 App. Div. 149; *Karsch v. Pottier & Stymus Mfg. Co.*, 82 App. Div. 230; *Marine Bank v. Nelson*, 31 N. Y. 33; *Wilson v. Met. El. Ry. Co.*, 120 N. Y. 145;

Fifth Nat. Bank v. Navassa Phosphate Co., 119 N. Y. 256; *Merchants Banking Assn. v. N. Y. & S. White Lead Co.*, 35 N. Y. 505.) The W. J. Sullivan and Lawrence Bros. liens were not valid in any event as against the real property of the defendant, appellant, Empire City Racing Association. (*McNulty Bros. v. Opperman*, 164 App. Div. 949; 221 N. Y. 98.) Mechanics' liens filed by laborers who cashed their pay checks with third parties and retained the moneys are invalid. (*Knapp v. Brown*, 45 N. Y. 207; *Muldoon v. Pitt*, 54 N. Y. 269; *Rollins v. Cross*, 45 N. Y. 766; *Deaz v. Chrystie*, 2 Abb. Pr. 109; *Ogden v. Alexander*, 63 Hun, 56; 140 N. Y. 356; *Gibson v. Lenane*, 94 N. Y. 183; *Stevens v. Ogden*, 130 N. Y. 182.) The lien notices of the plaintiff and defendants, respondents, lienors were defective and insufficient. (*Grippen v. Weed*, 22 App. Div. 593; 165 N. Y. 612; *Finn v. Smith*, 186 N. Y. 466; *Fanning v. Belle Terre*, 152 App. Div. 718; *Mahley v. German Bank*, 174 N. Y. 499; *Strauchen v. Pace*, 195 N. Y. 167; *Bossert v. Fox*, 89 App. Div. 7.)

George H. Taylor, Jr., and *Everett L. Barnard* for plaintiff, respondent, and *Wright Ogden Company*, defendant, respondent. The findings of consent on the part of the owner as far as the parties joining in this brief are concerned being supported by evidence the judgment of the Special Term charging the owner's interest in the property with the liens of said parties and the Appellate Division's determination of affirmance were both proper as to the plaintiff and defendant *Wright-Ogden Company*; as a matter of law the fee interest of the appellant was chargeable with their liens. (*Wahle Phillips Co. v. Fifty-ninth Street, etc., Co.*, 153 App. Div. 17; *McNulty Bros. v. Offermann*, 152 App. Div. 181; *N. Y. El. S. & R. Co. v. Bremer*, 74 App. Div. 400; *Hilton & Dodge Lumber Co. v. Murray*, 47 App. Div. 289; *Nat. Wall Paper Co. v. Sire*, 163 N. Y. 122; *Rice v. Culver*, 172 N. Y. 60; *Cowen v.*

Paddock, 137 N. Y. 188; *Butler v. Flynn*, 51 App. Div. 225; *Mosher v. Lewis*, 14 App. Div. 565; *Steeves v. Sinclair*, 56 App. Div. 448; 171 N. Y. 676; *Barnard v. Adjoran*, 166 App. Div. 535; 191 N. Y. 556; *Tinsley v. Smith*, 115 App. Div. 708; 194 N. Y. 581; *Jones v. Menke*, 168 N. Y. 61, 64; *Miller v. Mead*, 127 N. Y. 544, 549; *Gates v. Natural Fair, etc.*, 172 App. Div. 581.) The notices of lien filed by the parties on whose behalf this brief is submitted are sufficient in form to charge the real estate in question including the fee interest of the appellant therein; the tenant did not appeal to this court. (*Clarke v. Heylman*, 80 App. Div. 572; *Kerrigan v. Fielding*, 47 App. Div. 246; *Hubbell v. Schreyer*, 14 Abb. [N. S.] 284; *Beals v. Congregation*, 7 E. D. Smith, 564; *Anderson v. Dillaye*, 47 N. Y. 678; *Luscher v. Morris*, 18 Abb. [N. C.] 67; Lien Law, art. 2, § 9, subd. 7; *Waters v. Goldberg*, 124 App. Div. 511; *Grippin v. Weed*, 22 App. Div. 593; 165 N. Y. 612; *Strauchen v. Pace*, 195 N. Y. 167; *Kerrigan v. Fielding*, 47 App. Div. 246; *Hall v. Thomas*, 111 N. Y. Supp. 979.) The letters of the appellant to the fair association accorded the consent of the owner unconditionally; the consent was absolute and the acceptance of the individual bond was likewise absolute; the letter constituted merely a contract between the owner and the tenant, in pursuance of which the tenant was required to give a supplemental bond. (*Comey v. United Surety Co.*, 217 N. Y. 268; *Geneva M. S. Co. v. Coursey*, 45 App. Div. 248; *Maloney v. Iroquois Brewing Co.*, 63 App. Div. 454.)

Nathan S. Zucker for Percy Bloom, respondent. The defendant, appellant, Empire City Racing Association, consented to the making of the alterations and improvements which are the basis of the liens filed. (*Miller v. Mead*, 127 N. Y. 544; *Wahle Phillips Co., v. West 59th St. Co.*, 153 App. Div. 17; *McNulty Bros. v. Offerman*, 141 App. Div. 730; *Barnard v. Adorjan*, 116 App. Div.

535; 191 N. Y. 566; *Tinsley v. Smith*, 115 App. Div. 708.) The mechanic's lien filed by defendant Percy Bloom is in full compliance with the statute. (*Burkitt v. Harper*, 79 N. Y. 278.)

William J. Wallin for Samuel Woodfaulk et al., respondents. The alterations and improvements upon which the labor lienors worked were made with the consent of the owner, Empire City Racing Association, one of the appellants herein. (*Rice v. Culver*, 172 N. Y. 60.) The worthless checks given to the labor lienors did not operate as payment, nor prevent the workmen from filing liens. The lienors having become re-possessed of the checks indorsed by them to third parties, and having offered to surrender the checks on payment of their liens, were properly awarded judgment on their liens. (*Teaz v. Chrystie*, 2 Abb. Pr. 109; *Linneman v. Bieben*, 85 Hun, 477.) The notices of lien of the labor lienors were sufficient and valid. (*Chambers v. Vassar's Sons & Co., Inc.*, 81 Misc. Rep. 562; *McDonald v. Mayor, etc.*, 170 N. Y. 409; *Strauchen v. Pace*, 195 N. Y. 167; *De Klyn v. Gould*, 165 N. Y. 282.)

Milo J. White for Yonkers Lumber Company, respondent. The evidence establishing the consent of the owner to the improvements made upon the property is sufficient. (*Steeves v. Sinclair*, 56 App. Div. 448; *Schmalz v. Mead*, 125 N. Y. 188; *Miller v. Mead*, 127 N. Y. 544.) The Yonkers Lumber Company contends that the name of the owner, as attempted to be stated in its lien, to wit, "James Butler," was sufficient, under the statute, to bind the interests of the lessor in the real property affected by the lien. (*Abelman v. Mayer*, 122 App. Div. 470; *Waters v. Goldberg*, 124 App. Div. 511.)

Stephen Holden and *James H. Cavanaugh* for Jacob Norden et al., respondents. There was consent of the

owner within the meaning of section 3 of article 2 of the Lien Law. (*Ray on Mech. Liens*, 279; *Nat. W. P. Co. v. Sire*, 163 N. Y. 122; *Jones v. Menke*, 168 N. Y. 61; *Montant v. Moore*, 135 App. Div. 334; *Toplitz v. Bauer*, 161 N. Y. 325; *Dunn v. Steubing*, 120 N. Y. 232; *Clark v. West*, 193 N. Y. 349.) The notices of liens filed by these defendants fully comply with the statute. (*De Klyn v. Gould*, 165 N. Y. 282; *Strauchen v. Pace*, 195 N. Y. 167.)

William J. Foster and *Francis M. Applegate* for Colwell Lead Company, respondent. The plaintiff amply proved consent on the part of the Empire City Racing Association to the improvements on the Empire City track, which proof is available in respect to the plumbing materials furnished by this defendant, respondent. (*H. & D. Lumber Co. v. Murray*, 47 App. Div. 289; *Nat. W. P. Co. v. Sire*, 163 N. Y. 131; *Tinsley v. Smith*, 115 App. Div. 708; *Burkitt v. Harper*, 79 N. Y. 273; *Otis v. Dodd*, 90 N. Y. 336; *Miller v. Mead*, 127 N. Y. 544; *Jones v. Menke*, 168 N. Y. 61; *Wahle Phillips Co. v. 59th St.-Madison Ave. Co.*, 153 App. Div. 17; *Wahle Phillips Co. v. Fitzgerald*, 83 Misc. Rep. 636; *Barnard v. Adorjan*, 116 App. Div. 535; *Steeves v. Sinclair*, 56 App. Div. 448; 171 N. Y. 676.) The naming of the Empire City Trotting Club, the original name of the Empire Racing Association, sufficiently complied with section 9 of the Lien Law in naming the owner of the premises. (*Fish v. Anstey Const. Co.*, 71 Misc. Rep. 2; *Strauchen v. Pace*, 195 N. Y. 167; *Hyatt v. McMahon*, 25 Barb. 457.) The contents of the lien notice of this defendant-respondent's mechanic's lien complied with the statute. (*Burkett v. Harper*, 79 N. Y. 273.)

CHASE, J. This action is brought to foreclose a mechanic's lien for materials furnished pursuant to a contract with a lessee of real property and used in

improvements thereon. Included among the defendants are the owner of the real property, Empire City Racing Association, the appellant; its lessee, National Fair and Exposition Association; ten individuals and corporations each of whom has filed a lien for materials furnished to the lessee and used in such improvements; one hundred and eleven individuals, each of whom has filed a lien for labor performed on such improvements, and the trustee in bankruptcy of the lessee. Judgment was obtained for the foreclosure of the plaintiff's lien, and also of the liens of the ten defendant materialmen, and seventy-nine of the laborers who had filed liens for their labor. The lien of one of the ten materialmen was not, however, sustained as against the appellant herein. The judgment in favor of the plaintiff and of the nine defendant materialmen and seventy-nine laborers sustaining their liens respectively, and directing the foreclosure thereof, was affirmed by the Appellate Division. It is as to each of said defendant lienors, challenged by the appellant in this court.

The Lien Law (Cons. Laws, ch. 33), section 3, provides: "A contractor, sub-contractor, laborer or materialman, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this article."

Proof of the consent or request of the appellant as the owner of the real property in question, to the performance of labor and furnishing of materials for the improvement thereof, is essential to sustain the several liens. The appellant owner denies that its consent has been given, or that it requested the performance of the labor or

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furnishing of the materials within the meaning of the section of the statute quoted. The Special Term has found that the consent and request was given and that finding has been sustained by the affirmance of the judgment at the Appellate Division.

On the 28th day of December, 1912, an agreement was entered into between the appellant and the defendant National Fair and Exposition Association, by which the racing association leased to the exposition association the real property on which the improvements were made for the term of five years from January 1, 1913, together with the personal property thereon. The exposition association agreed at its own expense to hold, annually, on said grounds, known as the Empire City Park, an agricultural, live stock and amusement enterprise, during the month of August, and, under certain conditions, for a longer period, and to pay the racing association twenty per cent of the gross receipts from the sale of tickets and admissions, with certain exceptions therein specified, and twenty per cent of the gross receipts for admissions to and seats in the grand stand. The exposition association agreed to keep the grounds and buildings in good condition and repair, and to use the same for other entertainments, baseball, public meetings, racing, horse training, etc., subject to the approval of the racing association, and to pay the racing association fifty per cent of the moneys received from all such sources except as in the agreement specifically provided.

It also therein provided that the exposition association has the "Right to change the location of, alter, re-arrange or remodel any buildings, fences, walks, roads or track now on the grounds provided *the consent of the first party is first obtained in writing.*"

It also therein provided that the exposition association has "The right to erect new buildings on such locations as are approved by the first party (Racing Association)

or to allow the privilege of erecting buildings to others; such new buildings as may be erected by the second party (Exposition Association) are to remain their property and may be removed from the premises by them at the termination of this contract provided that all the agreements herein contained have been faithfully performed by them.

"All other buildings erected by exhibitors are subject to removal by their owners at any time, it being understood that second party (Exposition Association) is to provide insurance on any buildings erected by themselves or by their permission."

It also therein provided that the exposition association is to "Spend or cause to be spent the sum of Twenty thousand dollars (\$20,000) on buildings and improvements within two (2) years, and a total sum of Fifty Thousand dollars (\$50,000) within four (4) years." It also contained a provision for the renewal of the lease at the end of the term.

The exposition association, without first obtaining the consent of the racing association in writing, commenced, early in 1913, to alter, re-arrange and remodel many of the buildings, fences, walks, roads and tracks on said grounds. On July 9, 1913, the exposition association delivered a letter to the racing association and therein referred to conversations theretofore had with its officers, and gave a detailed statement of changes and additions that it desired to make to the buildings and grounds of the park and asked for written consent therefor. The racing association replied on the same day, in which reply it referred to the provisions of the lease by which changes and additions are required to be made at the expense of the exposition association and added: "Subject to your furnishing us with a satisfactory guarantee of your ability to pay for such changes and additions and provided the work is completed before August 31, 1913, we will

accord you the following consents under the terms of said lease to take effect when such guarantee is furnished." Then followed a statement in detail of proposed alterations and improvements to which it would assent as in the letter stated.

It refused its assent without qualifications to certain proposed alterations and it also included a statement as follows: "In reference to the improvements of the present roadways and making new connections for the convenience of the public, we shall require full details before giving our sanction to the same."

On July 10 the exposition association gave to the racing association a bond as required by the letter of July 9 signed by two individual sureties. On July 11 the racing association wrote the exposition association as follows:

"We beg to acknowledge receipt of your temporary bond and to say that with the understanding that you will supplement it by July 22nd 1913 with one issued by the National Surety Company of New York City for \$20,000 the same is acceptable to us."

The bond with individual sureties was not rejected but retained and accepted. The statement in the letter quoted that its acceptance was with the understanding that another bond supplementary to it be issued by the National Surety Company by July 22d is a condition subsequent to the receipt, and its acceptance of the bond styled by it a "temporary bond." The bond with individual sureties or, as termed, the "temporary bond," is the one referred to as acceptable to the racing association and its acceptance constituted a consent to the improvements within the meaning of the Lien Law. Such consent was in no way qualified or restricted. It was as broad and comprehensive as the obligation of the bond or guarantee so accepted by it.

The failure of the exposition association to give as

required by the letter accepting the temporary bond, a further and supplementary bond of the National Surety Company, did not in itself constitute a withdrawal of the consent of the racing association to the continuance of the improvements at least without some specific affirmative action on the part of the racing association. The improvements that were continued pursuant to the consent during the time between the receipt of the letter of July 11 and July 22, the day named therein, proceeded without interruption or notice so far as appears by the record until about August 18th, when proceedings were commenced which resulted in the exposition association being declared a bankrupt on August 29, 1913.

Expenditures by the exposition association to the amount of \$20,000 in two years, and \$50,000 in four years, were not only contemplated by the racing association but were, as we have shown from the lease, made obligatory on the part of the exposition association. The rental to be paid by the exposition association was wholly dependent upon the receipts to be obtained from the exhibitions to be held on the grounds. The racing association was in part to reap the benefit of the expenditures for improvements through its share in the anticipated receipts from the contemplated use of the property. Its share of such contemplated receipts was its only rental under the lease.

It also appears from the lease that the exposition association was required by it at its own expense to keep the grounds and buildings in good condition and repair. This provision was without qualification. The provision in the lease that the owner's written consent should be given before any alterations were made in the buildings, fences, walks, roads or track was for the benefit of the owner and could be waived by it. The possession of the property was in the exposition association but the improvements were not alone at its initiative. They

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were contemplated by the parties, and in part at least required under the lease by which the exposition association obtained and held its possession of the property. There is evidence that the racing association had full knowledge of the changes and alterations that were being made during the time of the correspondence mentioned and at all times stated in the several liens that were filed and that such improvements were being hastened by common consent in preparation for the August exhibition to be given in accordance with the terms of the lease and that the secretary of the exposition association from August 2 maintained an office in the property in view of the improvements then in progress and accepted for the racing association its share of the receipts as provided by the lease.

Full knowledge and general acquiescence in the improvement of the real property considered in connection with the covenants and agreements contained in the lease are some evidence of consent on the part of the owner within the meaning of the statute. (*National Wall Paper Company v. Sire*, 163 N. Y. 122; *Barnard v. Adorjan*, 116 App. Div. 535; *affd.*, 191 N. Y. 556; *Tinsley v. Smith*, 115 App. Div. 708; *affd.*, 194 N. Y. 581.) The Special Term found that the improvements were made with the consent and knowledge of the owner and such finding is not without some direct and other evidence to sustain it.

It is urged that the lien of the defendant William J. Sullivan should not be sustained because the appellant expressly refused its consent to the particular improvements upon which the materials furnished and work done by him were used and performed. The lien of the defendant Sullivan was filed for "gravel, crushed stone and sand" furnished, and for "carting, hauling, sprinkling, watering, and repairing and cleaning up generally the driveways and tracks" on the real estate

described. If the court had found that the materials furnished and work done by the defendant Sullivan were for "the improvement of the present roadways and making new connections for the convenience of the public" the contention of the appellant would be sustained in view of the express refusal of the racing association to "sanction the same." The court did find that the defendant Sullivan furnished the materials and did the work with the knowledge and consent of the racing association, and we cannot say that there is not some evidence to sustain such finding. The exposition association was required at its own expense "to keep the grounds and buildings in good condition and repair." And qualified assent was also given in the letter of July 9 to finish the half-mile track.

In the liens filed severally by the plaintiff and by five of the defendant materialmen it is stated that the name of the owner of the real property against whose interest the lien is claimed is Empire City Trotting Club. In the liens filed severally by the defendants Yonkers Lumber Company and Lawrence Brothers, materialmen, it is stated that the name of the owner of the real property against whose interest the lien is claimed is James Butler. In each of said liens it was stated that the interest of the owner, so far as known to the lienor, is in fee simple and said liens were filed and indexed accordingly.

The value and effect of these liens depend upon the statute. The term "owner" when used in the statute "includes the owner in fee of real property, or of a less estate therein, a lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment." (Sec. 2.)

The notice of lien shall state: "The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor." (Lien Law, sec. 9, subd. 2.)

"A failure to state the name of the true owner or contractor, or a mis-description of the true owner, shall not affect the validity of the lien." (Lien Law, sec. 9, subd. 7.)

The Lien Law quoted "is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same." (Lien Law, sec. 23.)

It appears that the appellant was incorporated by the name Empire City Trotting Club. In 1908, pursuant to an order of the Supreme Court authorizing it so to do, its name was changed to Empire City Racing Association in which name it has since continued. The change of name was authorized by title 10 of chapter 17 of the Code of Civil Procedure as it then existed. A large part of the real property described in the lease was purchased by the appellant and conveyed to it in the name of Empire City Trotting Club before its name was changed to Empire City Racing Association. The change of name in no way affected the identity of the corporation. The name of the owner as given in the liens of the several lienors mentioned was defective but not a substantial "misdescription of the true owner." The entry by the county clerk of the name of the appellant as given in the liens in the book as provided by the Lien Law, section 10, would give to the public substantially the same notice of the lien on appellant's real property as if the exact name by which appellant is now known had been used, or at least its entry therein would put a person examining the lien docket upon inquiry as to the intent and scope of the lien. No one has been misled

by the lienors using the name by which the appellant was incorporated and the lienors who gave the name of the owner of the real property as Empire City Trotting Club should be deemed to have substantially complied with the statute.

The liens of the Yonkers Lumber Company and Lawrence Brothers cannot be sustained. James Butler, named as the owner of the real property described in each of said liens, is an officer and stockholder of the racing association and actively connected with its management but he has no personal interest in the real property as an owner. A lien is not invalid simply by reason of a misdescription of the true owner if there is a substantial compliance with the statute. Where, however, the person named in the alleged notice of a lien as the owner of the real property against whose interest therein a lien is claimed is not an owner of any interest therein which is defined in the statute, there is a complete failure to comply with the directions thereof and the alleged lien is ineffectual and worthless. The findings of the Special Term so far as they sustain the filing of said liens against the appellant as owner are without any evidence to sustain them. There is no special finding of the court in any way sustaining either of said liens. It was not the legislative intent to give a lien upon the property through the filing of any notice describing it; it was intended that such a lien should be acquired as against the title or interest of the person party to or assenting to the agreement under which the work was done "against whose interest therein a lien is claimed" in the notice. If the notice fails to state the name of the true owner then a provision of the 9th section preserved the validity of the lien so far as the person named as owner and against whom a lien is asked in fact, may have some title or interest. If this provision were to be construed as giving a lien against the unnamed owner of the fee, the

construction would violate the plain legislative intent that the notice of lien should only affect the person whom the notice names, or attempts to name as "owner." (*Strauchen v. Pace*, 195 N. Y. 167; *De Klyn v. Gould*, 165 N. Y. 282.)

Although it is expressly provided that the Lien Law must receive liberal construction it may not be extended to cases not clearly within its general scope and purview. (*Spruck v. McRoberts*, 139 N. Y. 193.)

We next come to the judgment so far as it affects the seventy-nine laborers whose liens were sustained. Each of the said seventy-nine liens was filed against the Empire City Racing Association and James Butler, as owners. We do not think that the liens are invalid as against the Empire City Racing Association because James Butler is also named as an owner. The notice of lien when entered in the "lien docket" (Lien Law, sec. 10) by the county clerk as against the racing association as owner, was not made valueless and ineffectual by the further docket of said liens as against James Butler as an alleged owner.

The delivery of worthless checks to the laborers by the exposition association for the whole or a part of the amount of their accounts for labor severally, does not in itself constitute a payment of said accounts particularly as to the laborers who upon ascertaining that the checks were worthless returned the same to the association. Some of the laborers, not knowing that the checks were worthless, indorsed and delivered them severally in payment for supplies received by them and several of those who so used their checks failed to pay and redeem them after they found that there was no money in the bank to pay the checks. Such defendants are not in a position to urge their right to file and sustain a lien for their accounts severally so far as they were canceled by the checks so used by them. So long as such checks

remain outstanding in the hands of *bona fide* holders they represent an indebtedness against the exposition association and the holders of said checks have a valid claim against the exposition association therefor while the liability of the laborers thereon, if at all, is by reason of their indorsement or guarantee express or implied of such checks when the same were transferred by them. Seven of the defendant laborers are affected by their having so transferred the checks received by them from the exposition association and have failed to repossess themselves of and surrender such checks to the exposition association or to the court herein.

The trustee in bankruptcy of the exposition association holds his title subject to the liens filed by materialmen and laborers which were filed within the time prescribed by statute. (*Gates & Co. v. Stevens Cons. Co.*, 220 N. Y. 38.)

There are many other questions presented on this appeal. It is enough in this opinion to say that they have all been examined by the court and we concur in the conclusions reached by the Special Term and Appellate Division herein so far as the same affect the questions now before this court.

The judgment so far as it is entered in favor of the defendants Yonkers Lumber Company and Lawrence Brothers should be reversed, with costs to the racing association against each in this court and in the Appellate Division. The judgment so far as it is in favor of the defendant laborers John Highley, James Cooney, Edgar C. Hulse and William Van der Wende should be reduced as follows:

The judgment in favor of John Highley from \$37.50 and interest to \$21 and interest;

The judgment in favor of James Cooney from \$22 and interest to \$3.25 and interest;

The judgment in favor of Edgar C. Hulse from \$80.99 and interest to \$10.68 and interest;

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The judgment in favor of William Van der Wende from \$72.75 and interest to \$10.70 and interest.

The judgment so far as it is in favor of the defendant lienors, Frederick McAleese, Thomas Hanrahan and Thomas Birch should be reversed as without any evidence to sustain it.

The reduction of the judgment as against the defendant laborers named and its reversal as against the other defendant laborers named should be without costs. The judgment in favor of the plaintiff and the defendants other than the defendants Yonkers Lumber Company, Lawrence Brothers, John Highley, William Van der Wende, James Cooney, Edgar C. Hulse, Frederick McAleese, Thomas Hanrahan and Thomas Birch should be affirmed, with costs against the appellant in favor of each respondent or association of respondents filing a brief in this court by one attorney or firm of attorneys.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Judgment accordingly.

CORA WILLIS, Appellant, v. F. EDWIN PARKER,
Respondent.

Municipal corporations — Auburn (city of) — negligence — sidewalks — liability of property owner for failure to keep sidewalk in repair as required by charter of city — party injured by defective sidewalk may bring suit directly against negligent owner.

The charter of the city of Auburn imposes a statutory obligation upon the owner of property abutting a public street in that city "to make, maintain and repair the sidewalk adjoining his lands." The statute also prescribes the liability of the owner for a failure to perform the legal obligation so enjoined by enacting that such owner shall be liable for any injury or damage, by reason of omission, failure or negligence to make, maintain or repair such sidewalk or for a

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violation or non-observance of the ordinances relating to making, maintaining and repairing sidewalks. (L. 1879, ch. 53, § 113; L. 1897, ch. 172.) The complaint alleged that plaintiff sustained severe personal injuries due to the negligence of defendant in failing to maintain and keep in repair a plank sidewalk on which plaintiff was lawfully traveling. By reason of the failure of the defendant to perform the statutory duty imposed upon him the rights of the plaintiff were violated and loss and harm inflicted upon her, and she was not required to first institute an action against the city. She was, if so advised, privileged to do so, or, as she elected, to bring suit directly against the defendant owner.

Willis v. Parker, 173 App. Div. 552, reversed.

(Argued December 21, 1918; decided January 7, 1919.)

APPEAL from a judgment, entered July 5, 1916, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to and directing dismissal of the complaint. The appeal brings up for review the interlocutory judgment.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank C. Cushing for appellant. The holding of the court below that the provision of section 99 of chapter 185 of the Laws of 1906, the charter of Auburn, creates no right of action in favor of a person sustaining personal injury directly against the owner of such walk or the premises to which it pertains, cannot be sustained. (*Cushen v. City of Auburn*, 22 Wkly. Dig. 387; *McMullen v. City of Middletown*, 187 N. Y. 37; *D., L. & W. R. R. Co. v. Madden*, 241 Fed. Rep. 808; 187 N. Y. 37.) It is not sought to charge this defendant with liability under that provision of the statute which required him to keep his walk safe alone, but under the further provision, which in express terms made him "liable for any injury or damage" resulting from his disobedience to the com-

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mand of the first provision. (*Riggs v. Palmer*, 115 N. Y. 506; *Mead v. Stratton*, 87 N. Y. 493; *Schlegel v. Am. Beer, etc., Co.*, 64 How. Pr. 196; *Chase v. N. Y. C. R. R. Co.*, 26 N. Y. 523.) Upon the ground of demurrer, that there is a defect of parties defendant, in that the city of Auburn is not a party defendant, if it were necessary to point out anything further in opposition, it is found in the authorities holding that in cases of injuries arising from torts, the injured person may sue all, or any one of several who are responsible for the injuries. (*Creed v. Hartmann*, 29 N. Y. 591; *Rappaport v. Werner*, 34 App. Div. 525; *Slater v. Mersereau*, 64 N. Y. 138; *Shearman & Redfield on Neg.* [4th ed.] § 122.)

Amasa J. Parker and *F. A. Parker* for respondent. The clause in the charter making a property owner liable for injuries was intended to make him liable to the city in the event that he did not obey its direction but as to the public generally the city alone is liable. (*Kosters v. Nat. Bank*, 62 Misc. Rep. 419; *Segal v. Ehrman*, 155 N. Y. Supp. 286; *Rochester v. Campbell*, 123 N. Y. 405; *Village of Fulton v. Tucker*, 3 Hun, 529; *Russell v. Vil. of Canastota*, 98 N. Y. 502; *McMahon v. Sec. Ave. R. R. Co.*, 75 N. Y. 231.) The immunity of the lot owner from liability for damages for defects in streets is founded in reason and justice, and is supported not only by authority but by the uniform current of authority, not only in this, but in our sister states. (*Brown v. Wysong*, 1 App. Div. 423; *Law v. Kingsley*, 82 Hun, 76; *Moore v. Gadsden*, 93 N. Y. 12; *Wenzlick v. McCotter*, 87 N. Y. 126; *Kirby v. Boylston Market Assn.*, 14 Gray, 249; *Taylor v. L. S. & M. S. R. R. Co.*, 45 Mich. 74; *Segah v. Ehrman*, 91 Misc. Rep. 481.)

HOGAN, J. The plaintiff in her complaint alleged that the defendant was the owner and occupant of premises

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commonly known as No. 120 Wall street, in the city of Auburn; that on the evening of September 10, 1912, while she was passing along Wall street in front of the premises of the defendant she sustained severe personal injuries due to the negligence of defendant in failing to maintain and keep in repair a plank sidewalk on which plaintiff was lawfully traveling. Additional facts are stated in the complaint sufficient to constitute a cause of action, assuming that the defendant was liable to respond in damages to the plaintiff.

The defendant served a demurrer to the complaint and stated as the grounds thereof, 1, that it appears on the face of the complaint that said complaint does not state facts sufficient to constitute a cause of action; 2, defect in parties defendants in that the city of Auburn is a necessary party defendant.

The demurrer was sustained and from a final judgment entered in favor of defendant plaintiff appeals to this court.

As the determination of the question presented upon this appeal is dependent upon a construction of section 99 of the charter of the city of Auburn, a review of the provisions of the charter relating to the authority of the common council to enact and enforce ordinances relating to streets and sidewalks is unnecessary.

Section 99 of the charter so far as material reads: "The owner or occupant of lands fronting or abutting on any street, highway, traveled road, public lane, alley or square, shall make, maintain and repair the sidewalk adjoining his lands and shall keep such sidewalk and the gutter free and clear of and from snow, ice and all other obstructions. Such owner or occupant and each of them, shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair such sidewalk, or to remove snow, ice or other obstructions therefrom, or for a violation or

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non-observance of the ordinances relating to making, maintaining and repairing sidewalks and the removal of snow, ice and other obstructions from sidewalks, curbstones and gutters * * *." (L. 1879, ch. 53, sec. 113, amd. L. 1897, ch. 172.)

Counsel for respondent in his brief asserts that the foregoing provision of the charter was first enacted by section 133, chapter 536, Laws of 1895, and as bearing upon the intention of the legislature in the enactment of the statute calls attention to the decision of this court in *City of Rochester v. Campbell* (123 N. Y. 405), which involved the liability of a property owner to the city of Rochester for a judgment recovered against that city by reason of an injury sustained by an individual due to the negligence of the abutting owner and argues that by reason of the decision in the *Campbell* case the city of Auburn procured the amendment of 1895 to the charter "making the abutting owner liable to it."

Evidently counsel for the respondent has been misinformed in reference to the legislative history of the quoted provision of the charter. The case of *City of Rochester v. Campbell* was decided by this court, December 2, 1890. The section quoted was originally section 113 of the charter (Laws of 1879, chap. 53) and was the subject of construction by the courts in *Cashen v. City of Auburn* decided in October, 1885. (Memorandum decision 22 Wkly. Dig. 387; appeal to this court dismissed, 109 N. Y. 658.)

In the *Cashen* case the action was brought against the city and lot owner to recover damages for a personal injury arising from snow and ice on a sidewalk. The plaintiff had a verdict at the Trial Term; exceptions were ordered heard in the first instance at the General Term; the city in that case contended that under section 113 of the charter, the present section 99, the duty of repairing sidewalks and keeping them clear of snow and ice was

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upon the owner or occupant of abutting lands and not upon the defendant the city, and a right of action is given against such owner or occupant for injuries sustained consequent upon a breach of that duty and not against the defendant the city. Upon a review of the case at the General Term an opinion was written by then Justice HAIGHT, afterward a member of this court for many years. The opinion has never been reported, the memorandum of the case in the Weekly Digest being, as indicated, a mere memorandum. In the course of the opinion written by Justice HAIGHT, referring to section 113 and a contention of the city thereunder, the opinion stated: "Very true the party suffering an injury may doubtless pursue either the city or the individual owning or occupying lands abutting upon the street. It is quite possible also that the individual owning or occupying the lands abutting upon the street may be liable to the city for any damage that it may be compelled to pay on account of defective sidewalks, but this does not relieve the city from liability in the first instance." The decision of the General Term was that a new trial was denied and judgment ordered for the plaintiff upon the verdict. It is apparent that the counsel for the city of Auburn in that case construed the charter provision as creating a liability on the part of the owner of the premises directly to the injured party in the first instance as claimed by appellant here, and in view of the stated facts any implied suggestion that the statute was amended in 1895 for the purpose of establishing a liability of a property owner over to the city due to the decision in the *Campbell* case fails.

That the legislature by the charter provision quoted intended to impose a statutory obligation upon the owner of property abutting a public street in the city of Auburn "to make, maintain and repair the sidewalk adjoining his lands" is apparent from the language of the

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statute. The duty imposed, the statute proceeds to prescribe the liability of the owner for a failure to perform the legal obligation enjoined in the following words: "Such owner * * * shall be liable for any injury or damage, by reason of omission, failure or negligence to make, maintain or repair such sidewalk * * * or for a violation or non-observance of the ordinances relating to making, maintaining and repairing sidewalks * * *."

The subject under consideration by the legislature in the enactment of the statute in question was the duty of the owner of property abutting the public street in the city of Auburn and the liability of such owner for a failure or omission to perform the duty, or negligence in a performance of the same. The statute is silent as to any duty or liability of the city thereunder. The liability imposed upon the owner was for *any* injury, that is for any violation of the rights of another resulting in loss or harm by the failure, omission or negligence of the owner to make, maintain or repair the sidewalk adjoining his property as required by the statute. In the case at bar by reason of the failure of the defendant to perform the statutory duty imposed upon him the rights of the plaintiff were violated and loss and harm inflicted upon her. She was the first person to suffer an injury. The fact that plaintiff sustained an injury did not necessarily result in an injury to the city. Had she commenced action against the city she might have been defeated by reason of failure to give to the city actual notice of the defect in the sidewalk forty-eight hours prior to the accident and the city thereby freed from liability. On the other hand had she succeeded in such action the city would immediately sustain not only an injury by reason of the action of the property owner but likewise damages which it in turn, the property owner having been vouched in the original action, could recover

under the statute against the property owner. Plaintiff was not required to first institute an action against the city. She was, if so advised, privileged to do so, or as she elected, to bring suit directly against the defendant owner.

The conclusion we have reached in this case is not in conflict with the decision made in the *Campbell* case. The charter of the city of Rochester considered in the *Campbell* case imposed a duty upon the owner of a lot or piece of land in the city to keep the sidewalks in good repair and to remove and clear away snow and ice therefrom. While the duty was imposed as stated, the Rochester charter did not contain a provision like unto that contained in the charter of the city of Auburn, creating a liability upon the property owner for any injury or damage by reason of a failure to make such repairs and to maintain the sidewalk as therein provided.

The city of Auburn under its charter is exempt from liability for damages or injuries sustained by any person in consequence of any sidewalk being defective or out of repair, etc., unless actual notice of the defective condition of such sidewalk shall have been given to the commissioner of public works or a sidewalk inspector at least forty-eight hours previous to such damages or injury. The general purpose of such provision is to relieve the municipal corporation from liability by reason of constructive notice. The municipal corporation is of necessity entitled to reasonable protection but the citizen is likewise entitled to consideration. The plaintiff in this action had a right to assume that the street and sidewalk over which she was passing was in a safe condition for travel thereon. For the injury she sustained she is remediless under the decision below as against the defendant and by reason of lack of information sufficient to enable her to serve actual notice upon the city officers may be deprived of a remedy for the injury

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she sustained. In view of the existing provisions of the charter we cannot ascribe such intention to the legislature.

The judgments below should be reversed and judgment ordered overruling defendant's demurrer, with costs in all courts to appellant, with leave to defendant upon payment of such costs within twenty days to answer.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, McLAUGHLIN and CRANE, JJ., concur.

Judgments reversed, etc.

DAVID LEVBERG, Respondent, v. HENRY D. SCHUMACHER,
Appellant.

Labor Law — provision that every vat and pan, the opening of which is below level of elbow of workman, shall be protected — such provision not applicable to a shallow trough set in ground and used for cooling red hot tires in a wagonmaker's shop.

The Labor Law (Cons. Laws, ch. 31, § 81, subd. 1) provides that every vat and pan wherever set so that the opening or top thereof is at a lower level than the elbow of the operator or operators at work about the same shall be protected as therein set forth. The complaint alleges that plaintiff was in the employ of the defendant at the shop and place of business of the defendant and that he and another workman were engaged in *cooling off in a trough* or hole full of water a red hot tire which had just been placed on a wheel; that in the course of the work of cooling off the tire the water in the trough would absorb the heat from the tire and would then become warmer and warmer and would be changed at intervals during the course of the work by adding cold water which was obtained from a sink near the trough; that while so engaged in his work he slipped and his left foot and leg went into the trough while it contained boiling hot water and he sustained the injuries for which he seeks to recover in this action. It is also alleged in the bill of particulars that by reason of the pipes being frozen it was impossible to obtain cold water. The defendant is a wagonmaker and maintains a shop in which he performs his work and in which plaintiff was employed. The trough is a wooden box set in the ground so that the top of it is even with the surrounding flag or brick floor. It has been maintained in the

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same manner during the twenty-three years that the defendant has maintained his business at the place where the injury occurred. *Held*, that such a trough is not a vat or pan within the meaning of the statute, and that there is nothing obviously or inherently dangerous in this trough nor was such an accident reasonably to be anticipated.

Levberg v. Schumacher, 173 App. Div. 640, reversed.

(Argued December 4, 1918; decided January 7, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 19, 1916, affirming a determination of the Appellate Term which affirmed a judgment of the City Court of the city of New York in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Siegrist and *Otto D. Parker* for appellant. The trough in question was not a "vat" or "pan," within the meaning of section 81 of the Labor Law. (2 Lewis' *Suth. Stat. Const.* [2d ed.] 751, § 393; *Sedgwick on Stat. Const.* [2d ed.] 221; *Black on Interpretation of Laws*, 134; *Jenkins v. Lafayette Box Board Co.*, 43 Ind. App. 463; *Bell v. P. & G. Mfg. Co.*, 152 App. Div. 434; *Rossiter v. Coopers' Glue Factory*, 149 App. Div. 752; 155 App. Div. 413.) The court erred in charging the jury that the failure to provide a railing was conclusive evidence of defendant's negligence. (*Wynkoop v. Ludlow Valve Mfg. Co.*, 196 N. Y. 324, 328; *Basel v. Ansonia Clock Co.*, 216 N. Y. 356; *Glens Falls Portland Cement Co. v. Travelers Ins. Co.*, 162 N. Y. 399; *Kimmerle v. Carey Printing Co.*, 144 App. Div. 714; *Campbell v. Kertscher & Co.*, 146 App. Div. 384; *Moskewict v. Allens Sons Rope Co.*, 153 App. Div. 376; *Scott v. International Paper Co.*, 204 N. Y. 49; *Gelder v. International Ore Treating Co.*, 150 App. Div. 184; *Kiernan v. Eidlitz*, 109 App. Div. 726; *Fluker v. Ziegle Brewing Co.*, 201 N. Y. 40.)

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Moses Feltenstein and *Morris D. Reiss* for respondent. The contrivance in question was a vat or pan within the meaning of section 81 of the Labor Law. (*Bohnhoff v. Fischer*, 210 N. Y. 172; *Hudson Iron Co. v. Alger*, 54 N. Y. 173.) The court correctly charged that the violation of section 81 of the act constituted negligence as a matter of law. (*Amberg v. Kinley*, 214 N. Y. 531; *Scott v. International Paper Co.*, 204 N. Y. 49.)

CHASE, J. This action is brought to recover damages for injuries sustained by reason of the alleged failure of the defendant to comply with section 81, subd. 1, of the Labor Law (Consolidated Laws, chap. 31). That section of the statute so far as applicable to this case provides: " * * * Every vat and pan wherever set so that the opening or top thereof is at a lower level than the elbow of the operator or operators at work about the same shall be protected by a cover which shall be maintained over the same while in use in such manner as effectually to prevent such operators or other persons falling therein or coming in contact with the contents thereof, except that where it is necessary to remove such cover while any such vat or pan is in use, such vat or pan shall be protected by an adequate railing around the same. * * * "

The complaint alleges that plaintiff was in the employ of the defendant " at the shop and place of business of the defendant " in New York city; that on a day named he " and another workman * * * were engaged in cooling off in a trough or hole full of water a red hot tire which had just been placed on a wheel; " that " in the course of said work of cooling off the tire, the water in the trough would absorb the heat from the tire and would then become warmer and warmer * * * the water in said trough after becoming warm would be changed at intervals during the course of the work by adding cold water which was obtained from a sink

right near the said trough," and that while so engaged in his work he slipped and his left foot and leg went into the trough while it contained boiling hot water and he sustained the injuries for which he seeks to recover in this action.

It is alleged in the bill of particulars that "the pipes leading to the sink mentioned in the complaint were frozen and permitted by the defendant to be so; so that it was impossible to obtain cold water from the sink and water had to be obtained from the engine which water was already warm when placed in the trough."

The defendant is a wagonmaker and maintains a shop in which he performs his work and in which plaintiff was employed. The trough is a wooden box set in the ground so that the top of it is even with the surrounding flag or brick floor. It has been maintained in the same manner during the twenty-three years that the defendant has maintained his business at the place where the injury occurred. The question is whether such a trough is a vat or pan within the meaning of the statute.

The purpose for which the trough or hole was maintained being to cool the heated iron tires, it was essential or at least desirable that the water therein should be cold, or as nearly so as it was practical to maintain it. This is recognized by the plaintiff as appears by his effort to show in his pleadings why the water at the time his foot slipped and entered the hole was hot enough to scald him. There is no evidence tending to show that the defendant was negligent in permitting the pipe leading to the sink near the trough to become or remain frozen, or that the plaintiff was in any way prevented from obtaining water only "somewhat warm" to renew the water in the trough from a point near the engine except that it was further away from the trough than the sink and required a greater effort to obtain it. It appears to have been the duty of the plaintiff to change the water

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in the trough, but on the morning in question it had been used to cool eight or nine pair of tires without change. We do not think that the statute quoted was intended to include every receptacle about a shop used, as was the *trough or hole* in the floor, simply to hold *water for cooling purposes*.

The water in the trough was not dangerous to the operator or operators at work about the same unless it was allowed to get scalding hot through failure of the operator or operators to refill it with cold or "somewhat warm" water.

The statute is generally for the "protection of employees operating machinery," and in the part thereof quoted referring to vats and pans it is intended to prevent "operators or other persons falling therein or coming in contact with the contents thereof." No one seems ever to have referred to the trough in question as a vat or pan or realized that there was any danger in coming in contact with the contents thereof as ordinarily used. The words of the statute are used with their ordinary meaning and, although the Labor Law should be construed in view of the purpose for which it was enacted, it should not be extended to include things and acts not fairly within the meaning of the words thereof as used by the legislature. The statute was not, in our opinion, intended to include a trough containing water which, except for unusual circumstances quite independent of the use of the trough itself, is not in any way dangerous to the operator or persons required to work around it.

The words used in the statute as defined in the standard dictionaries have a limited meaning and they are confined to particular receptacles. If the purpose of the statute quoted was to compel the guarding of all receptacles general and more comprehensive words would have been used to express such intention.

The trial court in substance charged the jury that the

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receptacle in the floor of the shop is included in the words "vat or pan" as used in the statute, and then further charged, "As a matter of law I charge you there can be no question of negligence on the part of the defendant; that the failure of the defendant to fulfill the statutory obligation must be accepted by you as negligence on his part and the plaintiff is entitled to your verdict," unless he was guilty of contributory negligence. The question of the plaintiff's contributory negligence was left to the jury.

The trial court held that the trough was a pan but not a vat. The Appellate Division erroneously stated that the trial court held that the trough was a vat within the meaning of the statute and then concurred in that holding. The uncertainty and difference of opinion in deciding how the words "vat or pan" can include so simple and harmless a contrivance as a blacksmith's trough for cooling heated irons is shown by what has been said by counsel and courts in this case. It emphasizes the wisdom of holding that the legislature did not intend by the statute that all receptacles containing liquids should come within its provisions.

It seems to us that the dissenting justices in the Appellate Division were right in holding that the trough was not a vat or pan and that "the means employed to cool the tire so as to shrink it on the wheel has been employed by blacksmiths from the earliest days. There is nothing obviously or inherently dangerous in this narrow, shallow trough nor was such an accident reasonably to be anticipated. Statutes are to be given a reasonable construction."

The judgment should be reversed and the complaint dismissed, with costs in all courts.

HISCOCK, Ch. J., COLLIN, CUDDEBACK and CRANE, JJ., concur; HOGAN, J., dissents; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

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STEEL STORAGE AND ELEVATOR CONSTRUCTION COMPANY, Respondent, v. F. W. STOCK et al., Defendants, and ALEX STOCK, Appellant.

Builder's contract — substantial performance — quantum meruit — trial — requests to charge.

1. The parties entered into negotiations for a contract for the construction of a steel grain tank. A written contract was prepared but was not entered into owing to the inability of the parties to agree on terms of payment. Work was commenced, however, on the job and plaintiff claims that it was fully completed. Final payment was refused because of defendant's claim that the work was not done according to contract specifications. Plaintiff contends that this is an action on *quantum meruit*, that it is entitled to recover the actual value of its work and materials, but it appears that its bargain was to construct the plant according to the plans and specifications which were to form part of the written contract. Plaintiff relied on the price specified in the unexecuted contract as being substantially the fair value of what the plans and specifications called for. The failure to agree on a price and terms of payment did not excuse plaintiff from proving performance. Hence, plaintiff was entitled to recover the fair value of its work and materials only as it built them into the elevator plant which it agreed to construct.

2. The capacity of the elevator which was to be built was to be 4,000 bushels an hour. The evidence tended to show that its capacity was not more than 3,300 bushels an hour. The credibility of this evidence was for the jury, but it squarely presented the question of non-performance of an essential feature of the contract. The judge charged the jury generally that "a substantial performance of the work is required." The ~~plaintiff's~~ counsel requested the jury be specifically instructed that if they found the capacity of the elevator was not more than 3,300 bushels per hour the plaintiff could not recover because he had not substantially performed his contract, which request was refused. This instruction should have been given and failure to do so was substantial error. Δ 1/2

Steel Storage & Elevator Construction Co. v. Stock, 172 App. Div. 936, reversed.

(Argued December 11, 1918; decided January 7, 1919.)

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Points of counsel.

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered January 26, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

August Becker and *Alonzo G. Hinkley* for appellant. The trial court erred in refusing to charge the jury that the plaintiff had failed to perform the Hillsdale contract. And again it erred in refusing to charge the jury that if they found that the plaintiff had not fully performed the contract according to the plans and specifications, that then the plaintiff could not recover. (*Easthampton L. & C. Co. v. Worthington*, 168 N. Y. 407; *Sherwood v. Houtman*, 73 Hun, 544; *Woodward v. Fuller*, 80 N. Y. 312; *Fuchs v. Saladino*, 133 App. Div. 710; *Spence v. Ham*, 163 N. Y. 220; *Flannery v. Sahagian*, 83 Hun, 109.) The plaintiff did not substantially perform the Hillsdale contract as a matter of law. The trial court erred in submitting the question to the jury. (*Van Orden v. MacRae*, 121 App. Div. 143; *Gompert v. Healy*, 149 App. Div. 198; *Lashinsky v. Silverman*, 48 Misc. Rep. 501; *Ketchum v. Harrington*, 45 N. Y. S. R. 59; *Rochkind v. Jacobson*, 126 App. Div. 357; *Mitchell v. Williams*, 80 App. Div. 527; *Fuchs v. Saladino*, 133 App. Div. 710; *Hollister v. Mott*, 132 N. Y. 18; *D'Amato v. Gentile*, 54 App. Div. 625; *Nesbit v. Braker*, 104 App. Div. 393; *Flaherty v. Miner*, 123 N. Y. 382; *North American Wall Paper Co. v. Jackson C. Co.*, 153 N. Y. Supp. 204; *Northwestern Theatrical Assn. v. Hannigan*, 218 Fed. Rep. 359.) The plaintiff cannot recover as for a substantial performance for the reason that it failed to prove the cost of remedying the defects and omissions in the Hillsdale elevator. The trial court erred in refusing to so charge the jury. (*Spence v. Ham*, 163 N. Y. 220;

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Carpenter Co. v. Ellsworth, 151 App. Div. 532; *Nesbit v. Braker*, 104 App. Div. 393; *St. George Cont. Co. v. City of New York*, 143 App. Div. 554; *Northwestern Theatrical Assn. v. Hannigan*, 218 Fed. Rep. 359; *Norton v. U. S. Wood Preserving Co.*, 89 App. Div. 237.) The plaintiff having failed to perform its contract either fully or substantially cannot recover for what it has done upon the theory of *quantum meruit*. (*Gersmann v. Walpole*, 79 Misc. Rep. 49; *Smith v. Brady*, 17 N. Y. 173; *Vedder v. Lennon*, 70 App. Div. 252; *Tinley v. Van Wert*, 119 App. Div. 738; *Morrell v. Irving F. Ins. Co.*, 33 N. Y. 429.)

A. G. Bartholomew for respondent. The trial court charged correctly as to the elevating capacity and water proof bins of the Hillsdale plant. (*Delafield v. Westfield*, 41 App. Div. 24; 169 N. Y. 582.)

POUND, J. This action was brought to recover a balance of \$13,000 for work, labor and services performed and goods, wares and materials furnished in the construction of a grain elevator plant at Hillsdale, Mich. Defendant Alex. Stock alone was served. The answer sets up that plaintiff entered into a contract to erect an elevator plant for defendant in accordance with certain plans and specifications for an agreed price and that plaintiff failed to carry out the terms and conditions of the agreement. The parties had entered into negotiations for a contract for the construction of the Hillsdale plant for the sum of \$24,200, and also for a contract for the construction of a steel grain tank at Litchfield, Mich., for \$5,000. Written contracts were prepared in both cases. The Litchfield contract was duly executed by both parties and the tank constructed, but the Hillsdale contract was not entered into, owing to the inability of the parties to agree on terms of payment. Work was

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commenced, however, on the Hillsdale job and plaintiff claims that it was fully completed. Final payment was refused because of defendant's claim that the work was not done according to contract specifications.

Plaintiff contends that this is an action on *quantum meruit*, and that it is entitled to recover the actual value of its work and materials; but it plainly appears that its bargain was to construct the Hillsdale plant according to the plans and specifications which were to form part of the written contract. The failure to agree on a price and terms of payment did not excuse plaintiff from proving performance. To hold a different doctrine would be to compel the defendant to pay for something he had not bargained for. "He can demand payment only upon and according to the terms of his contract, and if the conditions upon which payment is due have not been performed then the right to demand it does not exist." (*Smith v. Brady*, 17 N. Y. 173.) Plaintiff was entitled to recover the fair value of its work and materials only as it built them into the elevator plant which it agreed to construct. (*Stewart v. Newbury*, 220 N. Y. 379, 384.) It relied on the price specified in the unexecuted contract as being substantially the fair value of what the plans and specifications called for. A small item of extras is included in its demand. One of the specifications of machinery equipment called for "2 steel elevator legs, capacity each 4,000 bu. per hr.," and plaintiff's chief engineer testified that the capacity of the elevator was to be 4,000 bushels an hour as he remembered it. No dispute arises on this point. The evidence tended to show that the capacity of the elevator was not more than 3,300 bushels the hour. The credibility of this evidence was for the jury, but it squarely presented the question of non-performance of an essential feature of the contract.

The learned court in general terms charged the jury correctly on this point. It said: "A substantial per-

formance of the work is required. Slight omissions or deviations will not be regarded, but all essential requirements must be thoroughly met."

Defendant's counsel then sought to have the jury instructed more specifically. He said: "I ask your honor to charge the jury that if they find that the capacity of the elevator was not more than 3,300 bushels per hour, that then the plaintiff cannot recover because he has not substantially performed his contract." Then followed this colloquy.

The court: "I have already charged that if the plaintiff has not substantially performed his contract he cannot recover. There is no need of going into all the details about that."

Defendant's counsel: "I think that I ought to bring that question squarely up, because as I view the evidence it is undisputed that this Hillsdale elevator capacity did not exceed 3,300 bushels per hour."

The court: "That was at a certain state of the machinery. There was testimony, as I recall it, and the jury will correct me if I am in error, that by setting up the machinery they could get a better — greater result."

Defendant's counsel: "They did set it up."

The court: "They could set it up more. There is nothing here on which I could hold conclusively that they could not set it up more and make it run 4,000. I appreciate that there is testimony to that effect, that it did reach only 3,300, but they increased the speed to that amount from some twenty-four or twenty-five hundred to thirty-three hundred, by simply adding to the speed of the machinery."

Defendant's counsel: "Your honor will recall that the lower part of the elevator was so constructed that they could not crowd the elevator beyond that."

The court: "That is what I leave for the jury to say,

those are facts in connection with the case that I think are not conclusive upon me."

Defendant's counsel: "Your honor will give me an exception to the charge as made and to the refusal to charge as requested."

The discussion indicates clearly enough that the learned court had in mind the correct application of the rule that plaintiff could recover nothing unless the jury found that it had met all essential requirements of the contract, including the requirement of 4,000 bushels capacity, but the learned court did not at any time definitely say to the jury that the plaintiff could not recover any sum whatever if they found that the capacity of the elevator was limited to 3,300 bushels the hour. If they so found, no room remained for conflicting inferences. With reluctance, we are constrained to hold that this was substantial error. The jury may have failed to grasp the idea that they could not find for the plaintiff in some amount on some theory of *quantum meruit* under which plaintiff would be entitled to recover the fair and reasonable value of the work and materials actually performed and furnished by it. Here was a large grain elevating plant where rapid performance was a material element. Here was uncontradicted — if not undisputed — evidence that in an important detail the elevator was seriously defective. On this state of facts we have a verdict as to the elements of which we can only conjecture, but which is substantially less than plaintiff was entitled on the evidence to recover for full performance, even after allowing the defendant the full amount of his counterclaim for damages for non-performance of the Litchfield contract. Juries are at times capricious, and it may be that the reduction was made on no general principles, but it is at least arguable that the attempt was made to give some credit to defendant on account of the inferior capacity of the elevator. The

jury should have been plainly told that they could not thus adjust the differences of the parties. Abstract legal propositions, sound in themselves, may wholly fail to enlighten if their application to the case at bar is not pointed out. Substantial performance is a term of law which conveys little, if any, meaning to the lay mind and ordinarily sends the lawyer to his digests to discover the most recent illustrations of its judicial use.

Plaintiff offered no proof of substantial performance or of the cost of remedying defects. Defendant asked for and was refused instructions that plaintiff could not recover upon the theory of substantial performance. This ruling was properly excepted to. Strictly speaking, this was fundamental error (*Spence v. Ham*, 163 N. Y. 220), but it does not survive the unanimous affirmance. If it were not for the specific requests above set forth, we would have to assume that the evidence contained everything necessary to support the verdict. (*Cronin v. Lord*, 161 N. Y. 90.)

The judgment should be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., CUDDEBACK, CARDOZO and ANDREWS, JJ., concur; CHASE and COLLIN, JJ., dissent on ground the jury were not misled by the rulings of the trial court mentioned in opinion.

Judgment reversed, etc.

THE GENERAL FIREPROOFING COMPANY, Respondent,
v. THE KEEPSDRY CONSTRUCTION COMPANY et al.,
Defendants, NEW YORK STATE NATIONAL BANK,
Appellant, and THE PEOPLE OF THE STATE OF NEW
YORK, Respondent.

Lien Law — contract for furnishing and equipping locker rooms in state capitol — assignment of such contract to bank as security for loan — state architect proper officer with whom to file assignment — trustees of public buildings must consent to such assignment — if such consent be not obtained before assignment is filed, the assignment cannot be enforced as against a subsequent mechanic's lien against contractor — appeal — question of irregularity of plaintiff's lien not having been considered by Appellate Division, such question cannot be reviewed in Court of Appeals.

1. A construction company made a contract with the trustees of public buildings of the state for furnishing and equipping locker and document rooms and for repairs, furnishing and equipping of the assembly chamber in the capitol at Albany. The plaintiff subsequently made an agreement with this company to furnish some of the material and perform some of the work under the first mentioned contract. Later, the construction company assigned to the defendant bank the money due and to become due on the contract as security for loans and advances of money to be used in the performance of its contract, which assignment was filed in the state comptroller's office. Thereafter the plaintiff's notice of lien was filed in the office of the state comptroller and the department of the state architect. *Held*, that section 16 of the Lien Law (Cons. Laws, ch. 33) which requires the filing of the assignment of such a contract with the head of the department or bureau having charge of such construction in order that it may have any validity includes an improvement on the real property of the state. *Held, further*, that the state architect is the head of the department having charge of the construction to which the assignment to the defendant bank relates and consequently he is the officer with whom the assignment should have been filed under this section, and that section 19-d of the Public Buildings Law has no application in this case.

2. The Appellate Division found that prior to the delivery of the assignment to the defendant bank, an officer of the construction company took the same to the state architect's office, and the assistant secretary in the architect's office procured the consent of the trustees of public buildings to the assignment and then returned it to the officer of the construction company. *Held*, that the assignment was not filed in the architect's office.

3. The defendant bank cannot raise the question that the plaintiff's notice of lien was irregular and invalid. The plaintiff did not appeal from that part of the judgment which held the notice valid and regular. The defendant bank did not appeal from the Special Term judgment at all. The Appellate Division not having considered the question it is not open to review in this court.

General Fireproofing Co. v. Keepsdry Const. Co., 173 App. Div. 528, affirmed.

(Argued December 5, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 14, 1916, modifying and affirming as modified a judgment in favor of defendant, appellant, entered upon a decision of the court on trial at Special Term.

The action was brought to foreclose a mechanic's lien.

On November 15, 1914, the Keepsdry Construction Company made a contract with the trustees of public buildings of the state of New York for furnishing and equipping locker and document rooms and for repairs, furnishing and equipping of the assembly chamber in the capitol at Albany. The plaintiff subsequently in November made an agreement with the Keepsdry Construction Company to furnish some of the material and perform some of the work under the first mentioned contract.

On December 31, 1914, the Keepsdry Construction Company assigned to the defendant, the New York State National Bank, the money due and to become

due on the contract with the trustees of public buildings as security for loans and advances of money to be used in the performance of its contract, which assignment was filed in the state comptroller's office January 6, 1915.

In February following, the plaintiff filed its notice of lien against the money of the state accruing under the contract with the Keepsdry Construction Company. The plaintiff's notice of lien was filed in the office of the state comptroller and the department of the state architect in February, 1915.

Other notices of lien were filed against the same money but it is not necessary to consider them now. The controversy here is between the plaintiff, the General Fireproofing Company, with its notice of lien, and the defendant, the New York State National Bank, with its assignment. The position of the plaintiff is that the assignment was invalid because of the failure to file the same in the department of the state architect as required by section 16 of the Lien Law.

At the Special Term the court found in favor of the defendant, the bank, and postponed the plaintiff's lien to the defendant's assignment. The plaintiff appealed from so much of the judgment of the Special Term as thus postponed its lien and the Appellate Division modified the judgment in the respect appealed from and gave the plaintiff's lien preference over the bank's assignment. The defendant, the bank, appeals to this court.

James F. Tracey for appellant. Section 16 of the Lien Law does not apply to the improvement in question for the reason that it concerns personal and not real property. (*Gates & Co. v. Stevens Const. Co.*, 220 N. Y. 38.) Section 16 of the Lien Law has no application to public improvements upon state property but concerns only municipal property and municipal corporate moneys. (*Armstrong v. State Bank*, 177 App. Div. 265; *People v.*

Rossiter, 4 Cow. 143; *People v. Herkimer*, 4 Cow. 345; *Matter of Columbian Institute Co.*, 3 Abb. Ct. App. Dec. 239; *Matter of Utica*, 73 Hun, 256; *Denton v. State*, 72 App. Div. 248; *People v. Gilbert*, 18 Johns. 227.) If section 16 of the Lien Law be held to apply to improvements on state property, then the assignment to the bank was properly filed in the offices of the comptroller and of the trustees of public buildings. (*Armstrong v. State Bank*, 177 App. Div. 265; *Riverside Const. Co. v. State*, 218 N. Y. 597.) If the head of the department having charge of the construction of the public improvement in this instance is to be considered the state architect, then the assignment of contract was sufficiently filed in his office. (*American Radiator Co. v. City of N. Y.*, 223 N. Y. 193; *Hawkins v. Mapes-Reeve Const. Co.*, 178 N. Y. 236; *Smith v. City of New York*, 32 Misc. Rep. 380; *Manton v. Brooklyn, etc., Co.*, 217 N. Y. 284; *N. Y. C. Nat. Bank v. Wood*, 169 App. Div. 817.)

Frederick Hulse for respondent. The assignment to the bank is invalid as against mechanics' lienors. (Cons. Laws, ch. 33, § 16; *Bates v. S. S. Nat. Bank*, 157 N. Y. 322; *Kane Co. v. Kinney*, 174 N. Y. 69; *Brace v. City of Gloversville*, 167 N. Y. 452; *Hill v. American Surety Co.*, 200 U. S. 197.) The defendant bank cannot attack the validity of the plaintiff's lien. (*Kelsey v. Western*, 2 N. Y. 500; *Robertson v. Bullions*, 11 N. Y. 242; *Matter of Davis*, 149 N. Y. 539; *Wilson v. Mechanical OrguINETTE Co.*, 170 N. Y. 542; *Levy v. Schreyer*, 177 N. Y. 293.)

CUDDEBACK, J. The defendant, New York State National Bank, contends that section 16 of the Lien Law (Cons. Laws, ch. 33), has no application to public improvements upon state property, but concerns only municipal property and municipal corporate money.

Section 16 of the Lien Law reads as follows:

"§ 16. No assignment of a contract for the performance of labor or the furnishing of materials for a public improvement, or of the money, or any part thereof, due, or to become due, therefor, nor an order drawn by the contractor or sub-contractor upon the municipal corporation, or the head of the department or bureau having charge of the construction of such public improvement, or the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, shall be valid until such assignment or order, or a copy thereof, be filed within ten days after the date of such assignment of contract, or such assignment of money, or such order, with the head of the department or bureau having charge of such construction, and with the financial officer of the municipal corporation, or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, and such assignment or order shall have effect and be enforceable from the time of such filing, and no such assignment or order shall have any validity until the same shall have been so filed. The financial officer of the municipal corporation, or other officer or person with whom the assignment, order, or copy thereof, is filed, shall enter the facts relating to the same in the lien book or other book provided for such purpose."

It will be observed that this section makes special mention of a contract with a "municipal corporation" and designates the money to which the assignment relates as "corporate funds." The Appellate Division of the fourth department, upon the strength of these words in the statute, has held that the section has no application to a contract with the state but is limited to contracts with a municipal corporation. (*Armstrong v. State*

Bank of Mayville, 177 App. Div. 265.) The counsel for the bank relies upon this decision to support his argument.

I think the interpretation of section 16 of the Lien Law made by the Appellate Division in the case cited is too narrow and unduly restricts its application. The words "municipal corporation" and "financial officer of the municipal corporation" in the section are always followed by the words "or head of the department or bureau having charge of such public improvement" or "other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract" or words of similar import.

If it was intended that the section should apply only to municipal corporations, the use of these alternative expressions would be entirely inexplicable. The term "municipal corporation" includes a county, town, school district, village and city or any territorial division of the state established by law, with powers of local government. (Gen. Corp. Law [Cons. Laws, ch. 23], § 3.) If the alternative provisions in section 16 do not apply to the state, it is difficult to see how they have any force at all.

The opening words of section 16 are general and have reference to the assignment of all contracts for public improvements or the money due thereon, and section 2 of the Lien Law defines the term "public improvement" to mean an improvement on any real estate belonging to the state or a municipal corporation.

The language of section 16 is, therefore, easy of interpretation, and taken in its ordinary sense and meaning, includes an improvement on the real property of the state.

The word "corporate" used to define the money assigned, as mentioned in section 16, to which the defendant attaches some importance, is certainly not an apt

word to define state funds. Still it is not entirely inaccurate. State money is certainly not individual money, and in a broad sense is correctly spoken of as corporate funds. But if it were otherwise, a misuse of the word "corporate" should not defeat the plain purpose of the section as we find it to be.

Section 16 of the Lien Law has long been regarded as regulating assignments of money due from the state for a public improvement, and if we now hold that it does not apply, it will be to overturn a well-settled practical construction of the law, and that conclusion we should avoid if another end is just as apparent.

The defendant bank also contends that the office of the trustees of public buildings was the proper place in which to file the assignment under section 16 of the Lien Law, and that the department of the state architect was not the proper place of filing.

Section 16 says the assignment shall "be filed with the head of the department or bureau having charge of such construction." Under the Public Buildings Law (Cons. Laws. ch. 44), as amended by chapter 111 of the Laws of 1914, the state architect is made the head of the department of architecture. The statute then further provides that the state architect shall prepare the drawings and specifications for and shall supervise the construction of all new buildings erected at the expense of the state, except as otherwise provided, and shall also prepare drawings and specifications for the alteration and improvement of existing buildings, and shall see that the materials furnished and the work performed in constructing, altering or improving any such buildings are in accordance with the drawings and specifications, and that the interests of the state are fully protected. This statute does not leave much room for dispute that the state architect is the head of the department having charge of the construction to which the assignment of the defend-

ant bank relates and consequently the state architect is the officer with whom the assignment should have been filed under section 16 of the Lien Law.

Counsel for the appellant, the bank, refers to section 19-d of the Public Buildings Law which provides that the article which contains the foregoing provision relating to the state architect shall not apply to contracts for plans, drawings, specifications and superintendence for the construction, erection, alteration or improvement of state buildings in Albany under the jurisdiction of the trustees of public buildings. Counsel argues therefrom that the article does not apply to the improvement here under consideration. But the article of the Public Buildings Law which contains section 19-d provides for obtaining the services of architects to prepare plans and specifications for public buildings and to superintend the construction thereof in competition, and section 19-d merely provides that contracts for architectural services so obtained shall not apply to the state buildings in Albany. We are not dealing here with any contract for plans and specifications or for superintendence. Section 19-d, therefore, has no application in this case.

The trustees of public buildings with whom the defendant bank says the assignment should have been filed, are the governor, president of the senate and speaker of the assembly (Public Bldgs. Law, § 2), and the finding of the court is that the trustees of public buildings keep no files or dockets for liens and have no office of their own as trustees. Therefore, it evidently was not intended that the assignment should be filed with them.

In the next place the defendant bank argues that its assignment was filed in the office of the state architect. It is necessary to a valid assignment that the trustees of public buildings should consent thereto. (State Finance Law [Cons. Laws, ch. 56], § 43.) It appears, as the

Appellate Division found, that prior to the delivery of the assignment to the defendant bank, an officer of the Keepsdry Construction Company took the same to the state architect's office and the assistant secretary in the architect's office procured the consent of the trustees of public buildings to the assignment and then returned it to the officer of the Keepsdry Construction Company.

The evidence upon this point abundantly supports the finding of the Appellate Division. The facts being as the Appellate Division found, the assignment had no inception until it was subsequently delivered to the bank, and it was, therefore, not in force when in the hands of the assistant secretary in the architect's office. The further finding of the Appellate Division that the assignment was not filed in the state architect's office has, therefore, support in the evidence and is conclusive in this court.

Again, the argument of the defendant bank is that the plaintiff's notice of lien was irregular and invalid because it relates to personal and not real property for which the law gives no lien, because it relates to materials or labor to be furnished in the future, for which the law gives no lien as to public improvements, and because the lien was not continued by an order of the court as required by section 18 of the Lien Law.

But the defendant bank cannot raise these questions here. The judgment of the Special Term was that the plaintiff by its notice had acquired a valid lien upon the moneys due upon the contract between the Keepsdry Construction Company and the state of New York. The plaintiff did not appeal from that part of the judgment but only from the part thereof which postponed its lien to the bank's assignment. The defendant bank did not appeal from the Special Term judgment at all. The Appellate Division reversed the judgment of the Special Term only so far as it was appealed from, and as its

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opinion shows, did not consider the respondent's attacks on the validity of the plaintiff's notice of lien. The jurisdiction of this court is limited to a review of actual determinations of the Appellate Division. (Code Civ. Pro. § 190.) The Appellate Division not having considered the question raised, which involves that part of the judgment of the trial court upholding the regularity and validity of the plaintiff's notice of lien, the question is not open to review in this court. (*Kelsey v. Western*, 2 N. Y. 500.)

The judgment appealed from should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Judgment affirmed.

SARAH R. MANN, Appellant, v. FERDINAND MUNCH
BREWERY, Respondent.

Landlord and tenant — person other than lessee in possession of leasehold premises — presumption and evidence that such person is in possession as assignee — when estopped from denying assignment — annulment of lease by warrant removing tenant — when effect thereof abrogated by agreement of parties.

1. Where a person other than the lessee is shown to be in possession of leasehold premises the law presumes that the lease has been assigned to him and that the assignment was sufficient to transfer the term and to satisfy the Statute of Frauds. So also payment of rent by the occupant to the plaintiff when the occupant has been let into possession by the original lessee is *prima facie* evidence of the assignment of the term, and a person in possession who holds himself out to the landlord as assignee is estopped from denying the assignment or objecting that the assignment was not in writing.

2. Usually the issuing of a warrant for the removal of a tenant from demised premises cancels the agreement for the use of the prem-

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ises and annuls the relation of landlord and tenant. (Code Civ. Pro. § 2253.) The parties may, however, as they did in this case, agree to the contrary and render the lessee liable to the end of the term although out of possession, and an assignee may also contract that he will remain liable after possession has terminated and for the period of the lease.

3. In this case there is evidence justifying the finding that the defendant expressly agreed and undertook to carry out the terms of the lease in question. By such assumption it took upon itself the obligation of the lessee to continue liable for the payment of the rent after the abandonment of the premises or after a final order in summary proceedings, and it is a fair inference from the facts that the assumption was in consideration of the assignment and consent thereto by the landlord.

Mann v. Munch Brewery, 173 App. Div. 746, reversed.

(Submitted December 4, 1918; decided January 7, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 10, 1916, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

Leon Sanders and *Jacob Zelenko* for appellant. Privity of contract between plaintiff's assignor and defendant was conclusively established. (McAdam on Landl. & Ten. [4th ed.] 889, § 247; *Mayer v. Wylie*, 43 Hun, 547; 122 N. Y. 663; *Frank v. N. Y., etc., R. R. Co.*, 122 N. Y. 197; *Dassori v. Yarek*, 71 App. Div. 538; *Zinwell v. Ilkowitz*, 83 Misc. Rep. 42; *Steward v. Long Island R. R. Co.*, 102 N. Y. 601.) The condition of the lease continuing liability for the payment of rent survives dispossession. (*Michaels v. Furst*, 169 N. Y. 381; *McReady v. Lindenborn*, 172 N. Y. 400; *Baylies v. Ingram*, 84 App. Div. 360; 181 N. Y. 518; *Slater v. Von Chorus*, 120

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App. Div. 16; *Chamberlain v. Parker*, 45 N. Y. 569; *Delavallette v. Wendt*, 75 N. Y. 579; *Dickinson v. Hart*, 142 N. Y. 183.) Assuming for the sake of argument that the liability of defendant arose out of privity of estate only, it is nevertheless well settled that the dispossession of defendant did not terminate its liability for damages for breach of the covenant to pay rent. (*Paddell v. James*, 84 Misc. Rep. 212; *Astor v. Lamoreux*, 4 Sandf. 524; *Frank v. N. Y., etc., R. Co.*, 122 N. Y. 197; *Steward v. Long Island R. R. Co.*, 102 N. Y. 601; *Dassori v. Yarek*, 71 App. Div. 538; *Tate v. Neary*, 52 App. Div. 78; *Paddell v. Janes*, 84 Misc. Rep. 212; *Zinwell v. Ilkowitz*, 83 Misc. Rep. 42; *Solomon v. Gleichenhaus*, 131 N. Y. Supp. 599; *Boreel v. Lawton*, 90 N. Y. 293.)

Victor E. Whitlock for respondent. In so far as defendant's liability as assignee is claimed to rest on privity of estate, this liability ceased after the lease was terminated by dispossession proceedings and the premises surrendered to the landlord. (*78th St. & Broadway Co. v. Purcell Mfg. Co.*, 152 N. Y. Supp. 52; *Frank v. N. Y., etc., R. R. Co.*, 122 N. Y. 197; *Dassori v. Zarek*, 71 App. Div. 538.) The clause in the lease purporting to continue the liability for rent of an assignee of the lease after dispossession proceedings was not binding upon the defendant whose tenancy by privity of estate was then extinguished. (*Paddell v. Janes*, 84 Misc. Rep. 221; *Baylies v. Ingram*, 84 App. Div. 360; 181 N. Y. 518; *Michaels v. Fishel*, 169 N. Y. 385; *McCready v. Lindenborn*, 172 N. Y. 400; *Slater v. Von Chorus*, 120 App. Div. 16; *Century Holding Co. v. Ebling Brewing Co.*, 162 N. Y. Supp. 1061, 1065; *Dassori v. Zarek*, 71 App. Div. 538; *Adams v. Koehler*, 136 App. Div. 623.) In so far as defendant's liability is rested upon privity of contract, the evidence does not establish a valid contract binding the defendant to the obligations of the lease. (*Dassori v. Zarek*, 71 App.

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Div. 538; *Trotter v. Hughes*, 12 N. Y. 74; *Stebbins v. Hall*, 29 Barb. 524.)

CRANE, J. This appeal brings up for review the rights of a lessor to recover from an assignee rent due under a lease accruing after dispossession. On the 1st day of February, 1910, Max Mann leased to Sarah Fish the premises 274 Broome street, Manhattan borough, New York city, for the term of five years and two months, beginning the 1st day of March of the same year. The term, therefore, expired May 1st, 1915. The leased property was a corner store and basement used as a saloon. Sarah Fish remained in the property until November, 1910, when the defendant, Ferdinand Munch Brewery, took possession and held it until dispossessed in August of 1913. The brewery paid the rent according to the lease from November, 1910, until and including August of 1913. This action is brought to recover the rent falling due each month from September, 1913, up to and including April, 1914. As stated, during this period the brewery was out of possession.

The action is based upon certain covenants in the lease hereafter mentioned, and which, it is claimed, were binding upon the defendant as assignee. The one question submitted to the jury is now immaterial as it only related to the lessor's authorization by the defendant to rent the premises in order to reduce the damage. Upon the questions here involved both sides moved for a direction of a verdict which was given in favor of the plaintiff, an assignee of the lessor. The Appellate Division having reversed the judgment, the plaintiff comes to this court under a stipulation for judgment absolute in case this appeal is decided against her. The reversal by the Appellate Division was solely upon questions of law as there is no statement in the order that the facts as found were not approved.

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In order to recover the plaintiff was obliged to prove that the Ferdinand Munch Brewery was an assignee of the lease and also had assumed the covenants contained therein.

Upon the first point there was ample evidence to establish the conclusion of the trial judge that the brewery was in possession as assignee. Where a person other than the lessee is shown to be in possession of leasehold premises the law presumes that the lease has been assigned to him. It further presumes that the assignment was sufficient to transfer the term and to satisfy the Statute of Frauds. (*Frank v. New York, Lake Erie & Western Railroad Company*, 122 N. Y. 197.)

Payment of rent by the defendant to the plaintiff when the defendant has been let into possession by the original lessee is *prima facie* evidence of the assignment of the whole term. (*Bedford v. Terhune*, 30 N. Y. 453, 459.) A person in possession who holds himself out to the landlord as assignee is estopped from denying the assignment or objecting that the assignment was not in writing. (*Carter v. Hammett*, 18 Barb. 608.)

To aid the plaintiff there was evidence of an assignment other than this presumption of law. On the 15th day of February, 1910, the lessor had given his written consent to the assignment of the lease to the Ferdinand Munch Brewery as collateral security, and on November 30th, 1910, he wrote a letter to the brewing company beginning with this statement:

"You have the assignment of the lease of my store No. 274 Broome Street, and you are in possession." He asked about the payment of the rent.

The defendant does not deny this statement in the reply sent the next day, but promises to pay the rent each month thereafter. This might very properly be considered an admission that the brewery had an assignment of the lease of the store at 274 Broome street. With

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the presumption that accompanies possession and this evidence we think there was ample proof of the assignment of the lease to the Ferdinand Munch Brewery.

Upon the second point of the plaintiff's case it is necessary to refer to that covenant in the lease which it is claimed the defendant assumed and thereby bound itself to pay the rent reserved to the end of the term. Sarah Fish, the lessee, made the following agreement:

"If the tenant is dispossessed by the issuance of service of any warrant or final order in summary proceedings, or if he abandon the premises, he shall nevertheless continue liable for the payment of the rent and the performance of all of the other conditions herein contained. The tenant shall not be relieved from liability for payment of rent, by any assignment which may be made of this lease, whether with or without the consent of the Landlord, but each and every assignee and assignor of this lease shall continue to remain liable for the payment of the rent and the performance of all the covenants and conditions herein contained until the expiration of the entire term thereof."

As to her, such an agreement was legal and survived her eviction in summary proceedings by the lessor. Usually the issuing of a warrant for the removal of a tenant from demised premises cancels the agreement for the use of the premises and annuls the relation of landlord and tenant. (Code of Civil Procedure, section 2253.) The parties may, however, as they did in this case, agree to the contrary and render the lessee liable to the end of the term although out of possession. (*Baylies v. Ingram*, 84 App. Div. 360; *affd.*, 181 N. Y. 518; *Michaels v. Fishel*, 169 N. Y. 381; *McCready v. Lindenborn*, 172 N. Y. 400.)

An assignee may also contract that he will remain liable after possession has terminated and for the period of the lease. (*Port v. Jackson*, 17 Johns. 239.) We do

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not say that the Ferdinand Munch Brewery by accepting the assignment and nothing more would be bound by the covenant and agreement of the lease above quoted. The rule is that the liability of an assignee grows out of the privity of estate and that only. It ceases when that privity ceases to exist and each successive assignee is liable only for such breaches of covenant as occur while there is privity of estate between him and the lessor. The covenant to pay rent runs with the land. (*Bedford v. Terhune*, 30 N. Y. 453; *Stewart v. L. I. R. R. Co.*, 102 N. Y. 601; *Consolidated Coal Co. v. Peers*, 166 Ill. 361; *Donaldson v. Strong*, 195 Mass. 429; *Tate v. Neary*, 52 App. Div. 78; *Stone v. Auerbach*, 133 App. Div. 75.) When the privity of estate is broken by re-assignment of the lease or surrender of possession the liability of the assignee on the covenants is at an end. (*Frank v. New York, Lake Erie & Western Railroad Company*, *supra*; *Durand v. Curtis*, 57 N. Y. 7.) The assignee is only bound by the covenants so long as he retains possession. (*Astor v. L'Amoreux*, 4 Sandf. 524; *Dassori v. Zarek*, 71 App. Div. 538; *Adams v. Koehler & Co.*, 136 App. Div. 623; *Tate v. McCormick*, 23 Hun, 218; *Paul v. Nurse*, 8 B. & C. K. B. 486; *Burnett v. Lynch*, 5 B. & C. K. B. 589, 602.)

This case, however, goes much further, for there is evidence justifying the finding that the brewery expressly agreed and undertook to carry out the terms of the lease as expressed and contained therein.

After it had entered into possession, the owner wrote the letter of November 30th, above referred to, asking to whom he should look for payment of the rent under the lease in the future. The defendant stated in writing that a check had already been sent for the rent for the past month and used these words: "We will send you a check for the rent on each Monday of the month and assume the lease." To assume the lease meant to assume

all of it and not such part only as might please the assignee according to subsequent events.

The definition of the word "assume" in matters of law is "to take upon one's self," or the agreement of the transferee of property to pay the obligations of the transferer which are chargeable on it. (*Springer v. De Wolf*, 194 Ill. 218.) In *Schley v. Fryer* (100 N. Y. 71, 74) it was said:

"The defendant claims that the word 'assumes' is not broad enough to impose a personal liability upon him to pay the mortgage in question * * * Unless that word was used to impose a personal liability upon the defendant to pay, it was wholly unnecessary and serves no purpose and adds nothing to the force of the language used. * * * That word is frequently used in deeds to impose a liability to pay upon the grantee, and we believe it is generally understood among conveyancers to impose such liability." (See, also, *People ex rel. White v. Loomis*, 27 Hun, 328; *Douglass v. Cross*, 56 How. Pr. 330.)

The defendant by assuming the lease, took upon itself the obligation of the lessee to continue liable for the payment of the rent after the abandonment of the premises or the final order in summary proceedings.

The lease also contained a provision that it should not be assigned without the consent of the lessor. This consent was expressly given in writing in February of 1910 as above stated. But it could also be implied from the acts and correspondence of the parties. After the interchange of the letters above referred to, the defendant remained in possession for three years, paying rent to the owner. Under these circumstances, there was sufficient consideration for the assumption of liability by the assignee.

If the conveyance of the lessee's interest to which the lessor consented, recites that the lessee, in considera-

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tion of the assumption by the assignee of all the obligations of the lessee arising out of the lease, has assigned the leasehold to the assignee then there is privity of contract between the lessor and the assignee, which the latter cannot terminate by assigning the lease and surrendering possession. (*Springer v. De Wolf*, 194 Ill. 218.)

Here we have an assignment of the lease, consent by the lessor to the assignment, a covenant of continuing liability on the part of the lessee and an assumption of this covenant by the assignee. It is a fair inference from these facts that the assumption was in consideration of the assignment and consent.

The order of the Appellate Division must be reversed and the judgment of the trial court in favor of the plaintiff affirmed, with costs in this court and in the Appellate Division.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK and HOGAN, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

BERTHA BUTLER, Respondent, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

Death — insurance (life) — presumption of death arising from continuous absence of seven years — general rule and application thereof — evidence required to establish such presumption.

1. While it is a general presumption in law that a person who has been continuously absent from his home or place of residence, and unheard from, or of, by those who, if he had been alive, would naturally have heard of him, through the period of seven years, is dead, the burden of establishing the facts which may, within reason, give rise to the presumption is upon the person invoking it. He must prove more than the mere fact of absence during the period, and must produce evidence to justify the inference that the death of the absentee is the probable reason why nothing is known about

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him. The proof should remove the reasonable probability of his being alive at the time.

2. Whether or not the presumption of death arises from the evidence is almost always, of necessity, a question for the jury. Whenever, however, the evidence is without contradiction and incapable, whether without or with contradiction, of creating, in reasonable minds, conflicting inferences, the question is one of law for the trial justice to decide.

3. Where in an action brought by the beneficiary of a policy of life insurance, who is the mother of the insured, the plaintiff offered no direct evidence of his death, relying upon the presumption of death arising from his absence, unheard of, during more than seven years, and the unconflicting evidence produced by plaintiff shows that the alleged decedent had the definite and fixed intention of not returning to the home of his parents but had formed the purpose of seeking elsewhere the opportunity and location satisfactory to him and conducive to the acquisition of money, and none of the communications to his parents and other facts justify the inference that death is the probable reason why nothing has been heard from, or of, him for seven years, the evidence does not uphold the presumption of death and a judgment for plaintiff entered upon the verdict of a jury cannot be sustained.

Butler v. Mutual Life Ins. Co., 173 App. Div. 1001, reversed.

(Argued November 19, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 1, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Murray Downs and *Frederick L. Allen* for appellant. Plaintiff must prove death and cannot recover merely upon a presumption of death. (*Buffalo L., T. & S. D. Co. v. Knights Templar*, 126 N. Y. 450; *Knights Templar v. Crayton*, 209 Ill. 550; *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232; *N. Y. L. Ins. Co. v. U. L. Ins. Co.*, 88 N. Y. 428; *Cunnius v. Reading School Sistrict*, 198 U. S. 458; *Scott v. McNeal*, 154 U. S. 34; *Cerf v. Diener*,

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210 N. Y. 156; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Donovan v. Twist*, 105 App. Div. 171; *McCartee v. Campbell*, 1 Barb. Ch. 455; *Straub v. A. O. U. W.*, 2 App. Div. 138; 158 N. Y. 729.)

Hiram Wooden and *Patrick Cauley* for respondent. The trial court properly submitted to the jury, as a question of fact, the matter of the death of the insured. (*Matter of Bd. of Education*, 173 N. Y. 321; *Higgins v. Eggleton*, 155 N. Y. 466; *Reilly v. Troy Brick Company*, 184 N. Y. 399; *Koehler v. New York Steam Co.*, 183 N. Y. 1; *Mannheimer v. Ind. Order*, 83 Misc. Rep. 457; *Connor v. N. Y. L. Ins. Co.*, 179 App. Div. 596; *Murphy v. Met. L. Ins. Co.*, 92 Misc. Rep. 479; *Policemen's Benev. Assn. v. Rycø*, 213 Ill. 9; *Matter of Benjamin*, 155 App. Div. 233; *White v. Emigrant Ind. Savings Bank*, 146 App. Div. 591; *Matter of Wagener*, 143 App. Div. 286; *Lawson on Presumptive Evidence*, 250; *Barson v. Mulligan*, 191 N. Y. 306; *Matter of Bd. of Education of N. Y.*, 173 N. Y. 321; *Mutual Ben. Life Ins. Co. v. Martin*, 108 Ky. 11; *Springmeyer v. S. C. W. W.*, 163 Mo. App. 338.) Plaintiff has furnished the defendant with satisfactory proofs of death. (*Mannheimer v. Ind. Order*, 83 Misc. Rep. 457; *Cummer Lumber Co. v. Ass. Man. Mut. Fire Ins. Corp.*, 67 App. Div. 151; 173 N. Y. 633; *Dobson v. Hartford Fire Ins. Co.*, 86 App. Div. 115; 179 N. Y. 551.)

COLLIN, J. The beneficiary in a policy of life insurance brought the action to recover the amount of the insurance. The policy, issued by the defendant, dated May 12, 1905, insured Charles E. Butler. The plaintiff offered no direct evidence of his death, relying on the presumption of death arising from his absence, unheard of, during more than seven years. At the trial the defendant duly excepted to the denial of its request at the close

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of the evidence that the complaint be dismissed. The jury, under the submission of the question whether or not the absence of the insured was caused by his death, rendered a verdict in favor of the plaintiff. The decision of the Appellate Division was not unanimous. We are, therefore, to determine whether or not the evidence upheld the presumption.

The evidence justified the jury in deeming established the facts: In May, 1905, the insured resided with his parents and two brothers in the city of Rochester, New York. In March, 1906, having learned the machinist's trade, he went to St. Louis, Missouri, and became an employee, as a traveling installer, of a telephone company. He was twenty-two years of age, in sound health, of good appearance and habits. He had received an ordinary education and possessed ordinary intelligence. He remained in the employ of the telephone company about one year, during which, in the performance of his duties, he traveled quite extensively. In April, 1907, he became an employee of the Western Electric Company at Coffeyville, Kansas. When such employment ceased is not disclosed. At the time he left Rochester his relations with the members of his family were very friendly. Through the year next succeeding March, 1906, he very frequently wrote letters to his mother. He wrote to no other member of the family. Thereafter his letters were infrequent and after October, 1907, no letter or communication was received by his mother from him, and no tidings whatsoever of him were received by his mother or anybody else to her knowledge. A letter from him to his mother dated St. Louis, Missouri, March 16, 1906, stated that he inclosed for her a money order for ten dollars of his wages. A like letter under the date of March 31, 1906, stated: "Received your letter yesterday and as pay day is here I waited till I could send a money order." A letter from him, dated "Sterling,

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Kansas, Oct. 16, 1906," stated: "I thank you most greatly for your offer to me but it is true I haven't saved a cent. I earn enough to keep myself honestly and independent. I have left Dodge for a couple of weeks as I couldn't get my brakeman's job till after November 1st; so I thought I would try at other division points till I got a position or go back to Dodge; at any rate I shall make a visit east in the spring. I want to visit the mining towns in Colorado, if possible. Then I am going to settle down, if things are as good in Rochester, as when I left. It shall be there; if not, why money is what I want and it will be where there is money as I can't make much. * * * Address me at Newton, Kansas, Gen. Del'y." In June, 1907, his mother received a postal card from him with the post mark on it "June 4 1907" and the inscription, "Plaza, Fort Scott, Kan.," which stated: "Going through to Kansas City." No communication came from him between the receipt of it and the receipt of a letter dated September 22, 1907. His parents and brothers had lost all trace of his whereabouts and occupation. In July, 1907, his mother wrote a letter to the Western Electric Company and a letter also to the employer telephone company, asking information with regard to him. Each company replied that it was unable to give her any information. In September, 1907, his mother received a letter from him, dated Hutchinson, Kansas, September twenty-second, 1907, which stated: "No doubt you will be surprised to hear from me as no doubt you think me in jail but I am not nor haven't been, but I have come to the conclusion that I am a failure in this old world and till I could take a brace I wasn't going to lie to you and make you think me a howling success. I am trying to get a job as brakeman on the Santa Fe R. R., as it pays pretty good money, averages about \$100 per month. I need recommendations to get it. Must have one from some one

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who has known me for five years back. I have been straight that long now or you would have heard different by this time, so I want you to get Pa to get S. G. McGrail to say he has known me that long and he has and say I am straight. It doesn't put him under obligations to R. R. Co. and if he will do that I will promise you \$10 a month for 6 mos. if I get the job. Write me a letter, don't scold, I may turn out O K after all, am certainly going to try. If I don't get this, I am going farther south for winter and north in spring. Tell me about S. P. Bernie, Elmer and Pa. I love you all, even if I have not showed it. Lovingly yours, Charlie. I leave Hutchinson to-night for Dodge City, Kansas, so address at Dodge City, Kansas, Gen'l. Del'y." Neither his mother nor father gave this letter answer or attention. The request was not complied with and no attempt was made to renew or continue the correspondence with him. The only further communication between them were two postal cards received from him in October, 1907, the one post marked Raton, New Mexico, which stated: "I am going farther west;" the other post marked Reno, Nevada, which stated: "I am on my way." In 1910 the plaintiff made ineffectual inquiry concerning him of the police marshal of Raton, New Mexico. In 1912 she received letters, in response to inquiries by her, from the authorities of thirteen or more state penal institutions, stating in effect that he was not and had not been a member of either of those institutions. In 1914 and 1915 ineffectual inquiry was made by her of the police department of Sioux City, Iowa, of the post office authority of Oklahoma, Oklahoma, and of the Union Pacific Railroad Company at Chicago, Illinois. The plaintiff also advertised in the *New York Journal* and Rochester and Chicago papers. When the insured left Rochester there was a deposit in his name of about one hundred dollars which remained on deposit and had been

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transferred, at a time not disclosed, from his name to that of his mother. We have concluded that, as a matter of law, no inference could be reasonably drawn from those facts that the insured was dead.

The law contains the general presumption that a person who has been continuously absent from his home or place of residence, and unheard from or of by those who, if he had been alive, would naturally have heard of him, through the period of seven years, is dead. The presumption does not arise, however, when there exist circumstances or facts which reasonably account for his not being heard of, or his absence and abstention from communication are reasonably explained without assuming his death, or where diligent inquiry as to whether he is alive or dead has not been made. The presumption is the offspring, created by the courts, of the statutes enacted centuries ago providing that a tenant of real estate for life, or a husband or wife, who had been under a continuous and unexplained disappearance for a designated number of years, should be presumed to be dead. (*Matter of Board of Education of New York*, 173 N. Y. 321. See, also, Code of Civil Procedure, section 841; Penal Law, section 341.) The burden of establishing the facts which may, within reason, give rise to the presumption is upon the person invoking it. He must prove more than the mere fact of absence during the period. He must produce evidence to justify the inference that the death of the absentee is the probable reason why nothing is known about him. Before a court is justified in presuming the death of a person, at a designated time, because of his absence, the proof should remove the reasonable probability of his being alive at the time. The presumption does not arise where it is improbable there would have been any communication with those who naturally would receive it. Whether or not the absence is unexplained except by death, or, in

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fine, whether or not the presumption arises from the evidence is almost always, of necessity, a question for the jury. Whenever, however, the evidence is without contradiction and incapable, whether without or with contradiction, of creating, in reasonable minds, conflicting inferences, the question is one of law for the trial justice to decide. (*Matter of Board of Education of New York*, 173 N. Y. 321; *Matter of Wagener*, 143 App. Div. 286; *McCartee v. Camel*, 1 Barb. Ch. 455; *Fuller v. New York Life Ins. Co.*, 199 Fed. Rep. 897.)

The instant case rests wholly upon unconflicting evidence produced by the plaintiff. The contents of the communications from the insured establish clearly and directly that he, prior to and at the time of the cessation of those communications, had the definite and fixed intention of not returning to the home of his parents. He had formed the purpose of seeking elsewhere, in the west, or the north or the south, the opportunity and the location satisfactory to him and conducive to the acquisition of money. He had become a fortune seeker. He declared his intention of settling and of engaging in business in another place than the city of Rochester, and his absence from that city does not create the inference that it was caused by his death. The contents of those communications and the other facts do not justify the inference that death is the probable reason why nothing has been heard from or of him since October, 1907. They establish that the insured left the home of his parents hopeful and intending to send his mother moneys from his wages to be saved. His absence was not to be temporary. The anticipated success and result were not achieved. The proof discloses two remittances only to his mother. His letter of October 16, 1906, reveals an offer of financial help from his mother to him, the facts that he had not saved a cent and was seeking a change in his occupation to that of a brakeman, and

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had acquired the inclination to seek new opportunities and locations. The ties of his former home and of family were disintegrating and dissolving. As early as April, 1907, he had formed the resolve or practice, at least, of refraining from sending letters to his family. Between that month and the latter part of September, 1907, the sole communication from him was the postal card of June 4, on which he stated: "Going through to Kansas City," and his parents did not know where he was or what he was doing and sought information in those respects from those who had employed him. His letter of September 22, 1907, shows that it was written solely because he wished his father to procure and forward to him a recommendation. It did not afford his parents any intelligence of his condition, occupation or location through the previous months during which he was unheard of. The first sentence of it is persuasive to the conclusion that his silence was deliberate and was to continue until he had proven, at least, that he was not "a failure." His practice of refraining from writing to his parents was naturally confirmed and made rigorous by the facts that his parents declined to fulfill his request or to further correspond with him. In the postal cards of October, 1907, he told them, simply, he was on his way farther west. He did not care to inform them of his intended or probable destination or occupation or vouchsafe a single word concerning his condition, intentions, or past activities. He, in effect, had ceased to communicate with his family through many months during which it is certain he was living, and his later writings indicate, beyond question, that the cessation would be continued. The clear and direct inference is that his resolution and habit, and not death, is the probable reason why nothing was known about him at the commencement of this action. This inference is upheld additionally by the other facts. He was young, unmar-

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ried, in good health, of good appearance and ambitious to prove himself capable of securing success. There is no suggestion in the evidence that he was despondent, or was or intended to be venturesome or prone to subject himself to unusual risks. We know commonly that disappearances such as his are not rare. His future appearance is not improbable. In view of the present agencies of extending aid and care in case of sickness or accident, and intelligence to those concerned in case of disaster or death, the facts put forward as the source of the presumption of death, because of absence and lack of intelligence, should be carefully considered and should sustain that presumption.

We do not consider whether or not the inquiry of the plaintiff concerning the insured was diligent and suitable.

The judgment should be reversed and a new trial granted, costs to abide the event.

CUDDEBACK, CARDOZO and CRANE, JJ., concur; HISCOCK, Ch. J., POUND and ANDREWS, JJ., dissent.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
EDWARD B. REDMOND, Respondent.

Crimes — appeal — order of Appellate Division reversing a judgment of conviction and ordering a new trial "for errors of law only" — such order cannot be reviewed in Court of Appeals — order should show that decision was upon weight of evidence.

The Court of Appeals cannot review an order of the Appellate Division reversing a judgment of conviction and ordering a new trial, where it is stated that such reversal is "for errors of law only." A convicted defendant has the right to have the Appellate Division review and render its decision upon the facts, but the statement that the reversal is for errors of law only does not establish that the Appellate Division has awarded him that right. In such case the

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appeal should be dismissed, but without prejudice to a new application to the Appellate Division for the amendment and resettlement of its order by stating, in it, its decision upon the weight of evidence.

People v. Redmond, 179 App. Div. 127, appeal dismissed.

(Argued November 21, 1918; decided January 7, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 27, 1917, which reversed a judgment of the Kings County Court rendered upon a verdict convicting the defendant of the crime of perjury and granted a new trial.

The facts, so far as material, are stated in the opinion.

Harry E. Lewis, District Attorney (*Hersey Egginton*, *Harry G. Anderson* and *John C. Ruston* of counsel), for appellant. The judgment and order of the Appellate Division reversing the judgment of conviction herein is properly appealable to this court. (*People v. O'Brien*, 164 N. Y. 57; *People v. Calabur*, 178 N. Y. 463; *People v. Miller*, 169 N. Y. 339; *People v. Damron*, 212 N. Y. 256; Code Cr. Pro. § 519; *Jones on Evidence* [2d ed.], art. 101; *Chamberlayne on Evidence*, § 45; *Chase's Stephen's Digest on Evidence*, §§ 1202, 1205; *Mandeville v. Reynolds*, 68 N. Y. 528; *Hess v. Smith*, 16 Misc. Rep. 55; *People v. Kelly*, 31 Hun, 225; *Williams v. Montgomery*, 60 N. Y. 648; *People v. Ostrander*, 28 Hun, 38; *People v. Draper*, 28 Hun, 1; *People v. Sprague*, 217 N. Y. 373; *People v. Gallagher*, 75 App. Div. 39; *People v. Buchanan*, 25 N. Y. Supp. 481.)

Andrew F. Van Thun, Jr., for respondent. The court is without jurisdiction to entertain this appeal. (*People v. Boas*, 92 N. Y. 560; *People v. Stevens*, 104 N. Y. 667; *People v. O'Brien*, 164 N. Y. 57; *People v. Calabur*, 178 N. Y. 463; *People v. Damron*, 212 N. Y. 256; Code Crim. Pro. § 519; *People v. Hovey*, 92 N. Y. 554; *People v.*

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Green, 137 App. Div. 763; *People v. Grout*, 166 App. Div. 220.)

COLLIN, J. The order of the Appellate Division, reversing the judgment of conviction and ordering a new trial, contained the statement, "the reversal of said judgment being had for errors of law only."

It is too thoroughly established to admit of discussion that this court has not jurisdiction to review the order or judgment of reversal and for a new trial in a criminal case unless it appears affirmatively in the body of the order that the court below has exercised its power to review the facts, and that, being satisfied with the judgment in that respect, the reversal was ordered for error of law only. The rule in criminal cases, and in civil cases involving a motion and an order for a new trial, was, prior to the amendment, in 1912, of section 1338 and the amendment, in 1914, of section 1346 of the Code of Civil Procedure, the same (*People v. Boas*, 92 N. Y. 560), and as we have stated. (*People v. O'Brien*, 164 N. Y. 57; *People v. Weiner*, 211 N. Y. 469, 475; *People v. Conroy*, 97 N. Y. 62, 72; *People v. Stevens*, 104 N. Y. 667; *Harris v. Burdett*, 73 N. Y. 136; *Mickee v. Walter A. Wood Mowing & R. M. Co.*, 144 N. Y. 613; *Wright v. Smith*, 209 N. Y. 249; *Caldwell v. City of New York*, 210 N. Y. 576.) The amendments to the sections of the Code of Civil Procedure have no relation to and no effect as to the operation of the rule in criminal cases. (Code of Civil Procedure, section 3343, subdiv. 20.) We have uniformly held that all proceedings in a criminal case are, generally speaking, governed by the Code of Criminal Procedure. (*People v. Hovey*, 92 N. Y. 554; *People v. Bissert*, 71 App. Div. 118; *affd.*, 172 N. Y. 643; *People ex-rel. Jerome v. Court of General Sessions*, 112 App. Div. 424; *affd.*, 185 N. Y. 504.) In a case in which the Appellate Division not only reverses the judg-

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ment but, in addition, dismisses the indictment and thus finally disposes of the prosecution, the rule does not govern. (*People v. Weiner*, 211 N. Y. 469.)

The rule still obtains in criminal cases in which a new trial is ordered upon a reversal. The reasons sustaining it are imperative and, in order that justice to the People and the convicted may be secured, should be given heed by the Appellate Division. The convicted defendant has the right to have the Appellate Division review and render its decision upon the facts. The statement in the order that the reversal is for errors of law only does not establish that the Appellate Division has awarded him that right. In case we reversed the order of the Appellate Division the judgment of conviction would stand and the defendant be deprived of the review of the facts by the Appellate Division, which is his right. It may be that the evidence would have justified or compelled a reversal. In case we affirmed the order, the new trial, thus necessitated, might be controlled by the decisions of the Appellate Division and this court and the People might thus be deprived of the right to have reviewed by this court the determination of the Appellate Division that error of law exists. The defendant has taken all the steps to obtain from the Appellate Division its decision, which it was in duty bound to give, upon the evidence. (*People v. Conroy*, 97 N. Y. 62, 72; *Harris v. Burdett*, 73 N. Y. 136; *Mickee v. Walter A. Wood Mowing & R. M. Co.*, 144 N. Y. 613; *People v. Stevens*, 104 N. Y. 667.)

The appeal should be dismissed, but without prejudice to a new application to the Appellate Division for the amendment and resettlement of its order by stating in it its decision upon the weight of evidence.

HISCOCK, Ch. J., CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Appeal dismissed, etc.

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ROBERT W. FISHER, Appellant, v. CITY OF MECHANICVILLE, Respondent.

Contract — village officers — when attorney employed by village at annual salary an employee of the village and not a public officer thereof — when entitled to compensation although all officers of village discharged when it became incorporated as a city.

Where an act incorporating a village contained a list of village officers in which the village attorney was not named, but the act provided that it should be the duty of the board of trustees and it should have the power and authority "to appoint annually an attorney and pay such attorney a reasonable annual salary," and the board appointed plaintiff such attorney and at the same time fixed his salary at a certain sum for a year, plaintiff was an employee of the village and not a public officer. He is, therefore, entitled to compensation for the year, no fault being found with his services, notwithstanding that a few months after his appointment as village attorney the village was incorporated as a city, the act of incorporation providing that all debts of the former village should be debts of the city, the plaintiff having been discharged on the theory that he held a public office in the village, which terminated on the organization of the city.

Fisher v. City of Mechanicville, 172 App. Div. 426, reversed.

(Argued November 15, 1918; decided January 7, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered June 1, 1916, reversing a judgment in favor of plaintiff entered upon a decision of the Saratoga County Court at a Trial Term, a jury having been waived, and granting a new trial.

The complaint alleged that on or about the 16th day of March, 1915, the village of Mechanicville entered into a contract with the plaintiff wherein and whereby the plaintiff agreed to render legal services to said corporation

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for the period of one year from that date, and for which services so to be rendered by him said corporation agreed to pay to the plaintiff the sum of seven hundred and fifty dollars; that the plaintiff thereupon entered upon the performance of said contract and well and faithfully performed all of the services by the provisions of said contract by him to be performed, and continued in such performance until the 23d day of July, 1915, upon which said date and without any cause whatever the defendant wrongfully discharged the plaintiff from said contract and wrongfully refused to accept the services so contracted for. The plaintiff then alleged the filing of a claim under the provisions of the charter and the rejection of the same by the defendant, and demanded judgment for the amount of the salary which he would have earned if permitted to perform.

The action was defended upon the ground that plaintiff was an officer of the former village of Mechanicville, as such was legislated out of office, and that whatever the relationship which existed between plaintiff and the said village, the same was terminated upon the erection of the city of Mechanicville, pursuant to its charter (L. 1915, ch. 170).

Further facts, are stated in the opinion.

Robert W. Fisher, appellant, in person. The plaintiff was not an officer of the village of Mechanicville. (*Snider v. Emerson*, 19 Utah, 319; *Collins v. Mayor, etc.*, 3 Hun, 680; *Quintard v. City of New York*, 51 App. Div. 233; *Sweeney v. Mayor, etc.*, 5 Daly, 274; 58 N. Y. 625; *Myers v. Mayor, etc.*, 69 Hun, 291; *Wardlaw v. City of New York*, 19 N. Y. Supp. 6; *Olmstead v. City of New York*, 10 J. & S. 481; *Fire Dept. v. Atlas S. S. Co.*, 106 N. Y. 566; *People v. Dillon*, 41 App. Div. 458; *Shanley v. City of Brooklyn*, 30 Hun, 396.) The facts show the existence of a contract of employment by the terms of

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which the plaintiff was entitled to serve one year and was to receive therefor the sum of \$750. (*Harvard Publishing Co. v. Syndicate Publishing Co.*, 94 Fed. Rep. 754; *Dougherty v. Briggs*, 231 Penn. St. 68; *McDougald v. Hulet*, 132 Cal. 154; *Boyd v. Miller*, 22 Tex. Civ. App. 165; *Allen v. City of New York*, 120 App. Div. 539; *Matter of Village of Kenmore*, 59 Misc. Rep. 388; *Bell v. City of New York*, 46 App. Div. 195; *Allen v. City of New York*, 120 App. Div. 539; *Chase v. City of Lowell*, 7 Gray, 33; *Caverly v. City of Lowell*, 1 Allen, 289; *Allen v. McKeen*, 1 Sumner, 276.)

Edward C. McGinity for respondent. The legislature terminated the appointment of appellant by the board of trustees of the village of Mechanicville on the 16th day of March, 1915, by the passage of chapter 170 of the Laws of 1915, which went into effect April 2, 1915, and became operative upon the approval of the electors of the village of Mechanicville at a special election held May 12, 1915 (Ch. 170, § 110). Appellant was an officer of the village of Mechanicville, and the position held by him was a public office. (*Bell v. Mayor, etc.*, 105 N. Y. 139; *People ex rel. Henry v. Nostrum*, 46 N. Y. 375; *United States v. Maurice*, 2 Brock. 96; *Matter of Path*, 20 Johns. 493; *Rowland v. Mayor, etc.*, 83 N. Y. 372; *Shelby v. Alcorn*, 72 Am. Dec. 169; *Hampton v. Logan County*, 4 Idaho, 646; *Chicago v. Edwards*, 58 Ill. 252; *People v. Hurlburt*, 24 Mich. 14; *Gray v. Granger*, 17 R. I. 201.) The appellant being an officer of the village of Mechanicville, his office terminated upon the organization of the government of respondent. (*Crook v. People*, 106 Ill. 237; *People v. Feitner*, 30 App. Div. 241; 156 N. Y. 694; *McQuillan Mun. Corp.* 1072, § 494; *Hoboken v. Gear*, 27 N. J. L. 265.) As a public officer or as a public appointee appellant cannot recover for services not performed. (*Connors v. City of New York*,

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5 N. Y. 285; *Smith v. City of New York*, 37 N. Y. 518; *Abrams v. Horton*, 18 App. Div. 208; *Mack v. Mayor, etc.*, 37 Misc. Rep. 370; 82 App. Div. 637; *Connelly v. Kingston*, 32 Misc. Rep. 489; *Higgins v. Mayor, etc.*, 131 N. Y. 128; *Howard v. Daley*, 61 N. Y. 362; *Terhune v. Mayor, etc.*, 88 N. Y. 247; *Dolan v. Mayor, etc.*, 68 N. Y. 278; *People ex rel. v. Miller*, 2 Mich. 459.) If the proceedings of the board of trustees of March 16, 1915, in appointing appellant are such as would constitute a contract binding upon the municipality for any period of time, such a contract is void as to duration after the taking effect of chapter 170 of the Laws of 1915. (*Emert v. Delong*, 12 Kans. 67; *Miliken v. Edgar Co.*, 242 Ill. 528; *Connelly v. Kingston*, 32 Misc. Rep. 489; *Manley v. High*, 29 L. R. A. N. S. 652; *Richmond County Gas Light Co. v. Middletown*, 59 N. Y. 228; *People v. Public Service Commission*, 153 App. Div. 129; *Gushee v. City of New York*, 42 App. Div. 37; *Britton v. Mayor*, 21 How. Pr. 251.)

CUDDEBACK, J. On March 16, 1915, the plaintiff, Fisher, was duly appointed village attorney by the board of trustees of the village of Mechanicville.

On June 29, 1915, the defendant, the city of Mechanicville, was incorporated with the same boundaries and inhabitants as the village of Mechanicville which it thus supplanted. (L. 1915, ch. 170.)

On the incorporation of the city, the plaintiff was discharged as village attorney on the theory that he held a public office in the village which terminated on the organization of the city.

The act incorporating the village of Mechanicville (L. 1891, ch. 106, as amended) provided with regard to a village attorney:

"It shall be the duty of the board and it shall have the power and authority * * *

"6. To appoint annually an attorney and pay such attorney a reasonable annual salary."

At the same time that the plaintiff was appointed his salary was fixed at the sum of \$750 a year.

The act incorporating the village contains a list of village officers and the village attorney is not named therein. No provision is made in the act requiring the village attorney to take an oath of office. Neither is there any provision specifying the duties which the village attorney shall perform, and the fact is found that he does not perform any governmental duties.

I think, therefore, that the plaintiff as village attorney was not a public officer but rather that he was an employee of the village.

Upon any reasonable interpretation of the act incorporating the village, it must be said that it authorized the appointment of a village attorney for a term of one year.

The court found that the village trustees and the plaintiff made a contract whereby the plaintiff agreed to render legal services to the corporation for the period of one year for the sum of \$750; that the plaintiff stood ready and willing to perform his contract; and that no fault was found with his services. These facts are sufficient to distinguish the case from those on which the defendant relies.

In *Richmond County Gas-Light Co. v. Town of Middletown* (59 N. Y. 228), cited by the defendant, the statute authorized the board of town auditors to enter into a contract with the plaintiff for lighting the streets of the town with gas. The board entered into a contract for five years. In the following year, 1866, the act authorizing the contract was repealed. This court held that the board of town auditors had no authority to make the contract for five years and when their power to contract was taken away by the repealing statute, the con-

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tract came to an end. But here the village trustees in appointing an attorney for one year did not exceed their authority.

Higgins v. Mayor, etc., of N. Y. (131 N. Y. 128) and *Quintard v. City of New York* (51 App. Div. 233) are cases which hold that where an individual has a right to employment or a preference in employment by a municipality, but is not actually employed, he cannot recover compensation though perhaps he may have a cause of action for damages against the officer who keeps him out of employment. But those cases do not control where the claimant has been actually employed under a contract to run for a definite period.

It is apparent furthermore that the legislature did not intend on the organization of the city of Mechanicville to abrogate the contracts made by the former village. It is expressly provided in the act organizing the city that all debts of the former village shall be the debts of the city and that the city shall succeed to all rights as well as the obligations and liabilities of the village in respect thereto. (L. 1915, ch. 170, § 7.)

From all that has been said it follows that the plaintiff is entitled to recover his compensation from the defendant.

I recommend, therefore, that the judgment appealed from be reversed and that the judgment of the County Court be affirmed, with costs in this court and in the Appellate Division.

HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Judgment accordingly.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. VILLAGE OF SOUTH GLENS FALLS, Respondent, v. PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Defendant, and UNITED GAS, ELECTRIC LIGHT AND FUEL COMPANY, Appellant.

Gas companies — public service commission — South Glens Falls (village of) — contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years — increase of such rates by company on the ground that they have become insufficient and confiscatory owing to increased cost of production — power of public service commission to regulate such rates.

1. There is a distinction between a contract made by a gas company to furnish a municipality *itself* with light and the terms and conditions upon which a municipality grants a franchise to furnish gas to its *inhabitants*. In the first instance the arrangement may be a contract pure and simple protected by the Constitution both federal and state from subsequent abrogation even by the legislature unless such power be reserved. But the regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations cannot be said to form contracts beyond the inherent police power of the legislature to modify for the public welfare.

2. In September of 1900 the village of South Glens Falls granted to the defendant company the right and power to use the streets within the village for the purpose of maintaining pipes and necessary feeders for lighting, fuel and other purposes for which gas may be used, for the term of fifty years to be furnished at a certain limited compensation. In August of 1917 the gas company increased its rate. Thereupon the village made complaint under section 71 of the Public Service Commissions Law (Cons. Laws, ch. 48) asking the commission for the second district to investigate the case and prohibit and restrain the gas company from raising its rate above that originally fixed by its license. It appeared that the cost of furnishing gas had during the past few years very largely increased. The only question presented was whether the franchise is such a binding contract that it could not be abrogated in any way by the gas company or by the public service commission. The latter body determined that it had power to regulate the rate to be charged for gas irrespective

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of the franchise and dismissed the complaint. The Appellate Division reversed the order of the commission and decided in effect that the public service commission had no power over the matter and granted the demand of the village that the company should be prohibited from charging more than the rate fixed in 1900. *Held, first*, that the legislature under the circumstances mentioned has the power to regulate the price of gas; *second*, that it has conferred that power on the public service commission. (Pub. Serv. Com. L. § 66, subd. 5; § 72.) (*Matter of Quinby v. Public Service Commission*, 223 N. Y. 244, distinguished.)

People ex rel. Vil. of South Glens Falls v. Public Service Commission, 185 App. Div. 912, reversed.

(Argued November 12, 1918; decided January 7, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 18, 1918, which reversed, on certiorari, a determination of the public service commission, second district, dismissing the relator's complaint against the United Gas, Electric Light and Fuel Company, and referred the matter back to the commission for action thereon in accordance with the prayer of the complaint.

The facts, so far as material, are stated in the opinion.

Erskine C. Rogers for appellant. The legislature has paramount and supreme rate-making power, especially in the matter of gas rates, where there is no constitutional restriction. (*Matter of Quinby*, 223 N. Y. 261; *R. C. G. L. Co. v. Town of Middletown*, 59 N. Y. 228; *People ex rel. N. Y. & N. S. T. Co. v. P. S. Comm.*, 175 App. Div. 872; *People ex rel. S. S. T. Co. v. Wilcox*, 196 N. Y. 212.) The legislature intended to delegate to the public service commission its undoubted power to permit an increase of a gas rate beyond that agreed upon between a gas company and the local authorities in a franchise. (*Village of Saratoga Springs v. Saratoga Gas Co.*, 191 N. Y. 123; *People ex rel. N. Y. Ry. Co. v. P. S. Comm.*, 181 App. Div. 338.) The village exceeded its grant of power

by the legislature by exacting as a condition to granting the franchise a fixed and arbitrary maximum rate for a period of fifty years. The village had no rate-making power at all. (*Vil. of Saratoga Springs v. Saratoga Gas Co.*, 191 N. Y. 149.) The legislature used the word "reasonable" in section 61, Transportation Corporations Law, as limiting the authority of the municipality to make any regulation or fix any rate that was unfair or confiscatory. (*Wilcox v. Consolidated Gas Co.*, 212 U. S. 19; *Matter of Rebecchi*, 51 Misc. Rep. 403; *Richman v. Consolidated Gas Co.*, 114 App. Div. 216.)

L. B. McKelvey for respondent. The public service commission has no other power in reference to rates fixed by agreement with the local authorities than to enforce adherence to those rates. (*Matter of Quinby*, 223 N. Y. 244; *Wilcox v. Richmond L. & R. R. Co.*, 142 App. Div. 14; 202 N. Y. 515.) The legal nature of a franchise granted by a municipality to a common carrier is the same as that granted to a transportation corporation, although the power of the legislature to abrogate their terms might differ in the two classes of cases, assuming always the intent of the legislature to do so. (*Rochester Tel. Co. v. Ross*, 195 N. Y. 431; *P. S. Comm. v. W. S. R. R. Co.*, 206 N. Y. 209; *Matter of N. Y. El. Lines Co.*, 201 N. Y. 334; *C. C. L. & F. Co. v. Tallahassee*, 186 U. S. 401; *W. U. Tel. Co. v. City of Syracuse*, 24 Misc. Rep. 338; *Ghee v. N. U. Gas Co.*, 158 N. Y. 512; *People v. O'Brien*, 111 N. Y. 40; *Wilcox v. R. L. & R. R. Co.*, 142 App. Div. 44; 202 N. Y. 51.)

CRANE, J. In September of 1900 the village of South Glens Falls, New York, granted to the United Gas, Electric Light and Fuel Company the right and power to use the streets within the village for the purpose of maintaining pipes and necessary feeders for lighting, fuel and other

purposes for which gas may be used. The right was for the term of fifty years.

It was provided that in consideration of this license the said company should charge no greater sum than one dollar and twenty-five cents (\$1.25) per thousand cubic feet for the use of gas for illuminating or fuel purposes.

The gas company established its plant in said village under this franchise and thereafter furnished gas to the inhabitants in accordance with its terms and conditions.

It appeared without contradiction that during the past five and one-half years the price of coal in the open market advanced 120% and at contract price approximately 74.6%; that the cost of manufacturing labor advanced 55.5% and that the taxes assessed against the company increased 37.6%, resulting in a cost to the company for delivery of gas at the consumers' burner in said village of \$1.7594 per thousand cubic feet.

In August of 1917 the gas company increased its rate to one dollar and sixty cents (\$1.60) per thousand cubic feet.

Thereupon and in January 1918, the village of South Glens Falls made complaint under section 71 of the Public Service Commissions Law (Cons. Laws, ch. 48) asking the commission for the second district to investigate the case and prohibit and restrain the gas company from raising its rates above one dollar and twenty-five cents (\$1.25) per thousand cubic feet. It was alleged in the complaint that the franchise granted to the company in 1900 constituted a valid and binding contract and that the company could not for the term of fifty years increase its rate above said figure.

On the hearing before the commission the village through its counsel waived all question as to the reasonableness of the increase and stated that the only question presented was whether the franchise was such a binding contract that it could not be abrogated in any way by

the gas company or by the public service commission. The latter body determined that it had power to regulate the rate to be charged for gas irrespective of the franchise of 1900 and dismissed the complaint. Upon review of these proceedings by the Appellate Division that court reversed the order of the commission and decided in effect that the public service commission had no power over the matter and granted the demand of the village that the company should be prohibited from charging more than the rate fixed in 1900.

The question is now presented to us as to whether the public service commission has power under the circumstances mentioned to regulate the price of gas. As the public service commission has only such authority as is given by the legislature of the state, the question resolves itself into two parts, *first*, has the legislature such power, and, *second*, has it conferred the power upon the public service commission.

The right which the village had to annex terms to its license given in 1900 to the gas company is to be found in article VII, section 61, subdivision 1, of the Transportation Corporations Law (Cons. Laws, ch. 63). This gives to gas companies the power "to lay conductors for conducting gas through streets * * * in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe."

Some of my associates are of the opinion that in view of the changes which naturally come with time in civic life the fixing of a given rate by a village for a period of fifty years was not a reasonable regulation within the terms of the above statute. However this may be, much broader principles are here involved which we feel called upon to decide.

Has the legislature the power to fix and regulate the price at which this gas company shall furnish gas to the

inhabitants of the village of South Glens Falls? In the first place we must note the distinction between a contract made by a gas company to furnish the municipality *itself* with light and the terms and conditions upon which a municipality grants a franchise to furnish gas to its *inhabitants*. In the first instance the arrangement may be a contract pure and simple protected by the Constitution both federal and state from subsequent abrogation even by the legislature unless such power be reserved. Such was the case of *Kings County Lighting Company v. City of New York* (176 App. Div. 175; *affd.*, 221 N. Y. 500). There the town of New Utrecht in December of 1889 made an agreement with the Kings County Gas and Illuminating Company for lighting the streets of New Utrecht for a term of ten years, extended to twenty-five by the legislature, at a rate of twenty-eight dollars (\$28) per street lamp. New Utrecht was thereafter merged into the city of New York. By the Laws of 1905, chapter 736, it was provided that a corporation selling gas to the city of New York should not charge in excess of seventy-five cents (\$.75) per one thousand cubic feet. The city succeeding to the liabilities of the town refused to pay the gas bills by virtue of this latter act, but it was said that any construction of the act of 1905 which would dissolve the obligation to the contract would be open to the charge of violating section 10 of article I of the Federal Constitution.

But the regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations cannot be said to form contracts beyond the inherent police power of the legislature to modify for the public welfare. Reason dictates that such arrangements could not be contracts falling within the constitutional provisions against abrogation. Assume that a village has granted to a corporation a franchise to use its streets for gas or electricity under a

rate which is reasonable for the conditions as they exist at the time, but which, as the village has grown into a city, is exorbitant and excessively profitable to the corporation. Reduction in the rate by the legislature so as to be reasonable to the consumer and profitable to the corporation would seem to be well within the police power of the legislature. Reduction in rates seems to be generally recognized as a public benefit, and yet an increase may be equally so. The terms and conditions upon which a village may permit a public service corporation to use its streets may prove unsafe, unhealthy and extremely improper, as the community expands and grows. New inventions and contrivances in common use may necessitate a change. To say that such conditions were beyond the legislative control would bind the public to the facilities of our forefathers and be contrary to the numerous statutes which have been passed and recognized as legal requiring service corporations to change their plants. Thus the present Public Service Commissions Law relating to gas corporations, section 66, provides that the commission shall have power to order such reasonable improvements as will best promote the public interests, preserve the public health and protect those using gas and those employed in the manufacture and distribution thereof.

If a village, as a condition of granting a franchise, should specify the kind of pipes and the particular method of service which the company should provide, could it be said that when these conditions proved unsafe to the public the legislature could not order improvements because the franchise was a contract beyond abrogation? The same reasoning applies to rates of service. Change in conditions, in equipment, in the process of manufacture or in the manufactory itself to meet modern conditions costs money, and yet this cost should not be considered if the health and safety of the public demand a change.

A reasonable increase in rates in order to provide the money for these changed conditions is as much a benefit to the public as a reduction in rates when the charge is excessive. It is a bad political economist who thinks the public is always served best by that which is cheap.

The authorities also sustain this view of the law. A municipal corporation is simply a political subdivision of the state and exists by virtue of legislative enactments. Rate regulation is a matter of the police power of the state and the terms and conditions such as here in question contained in a franchise to a service corporation may be modified without impairing the obligation of a contract within the provisions of the Constitution. (*Louisville & N. R. R. Co. v. Mottley*, 219 U. S. 467, 480, 482; *Texas & N. O. R. R. Co. v. Miller*, 221 U. S. 408, 414; *Buffalo E. S. R. R. Co. v. Buffalo Street R. R. Co.*, 111 N. Y. 132; *City of Rochester v. Rochester Ry. Co.*, 182 N. Y. 99; *affd.*, 205 U. S. 236; *Portland Ry., L. & P. Co. v. City of Portland*, 201 Fed. Rep. 119, 125.)

The second question is this: The legislature having power to regulate charges of this gas company to the consumers of the village of South Glens Falls, has it conferred this power upon the public service commission? Chapter 480 of the Laws of 1910, known as the Public Service Commissions Law, would seem to give this power. Subdivision 5 of section 66 reads:

"Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished notwithstanding that

a higher rate or charge has heretofore been authorized by statute."

Section 72 provides:

"An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section seventy-one of this chapter, *or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it.* After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished. * * *"

No statute has fixed the price of gas for this community. It seems quite clear to us, therefore, that the legislature having the power to regulate the charge to be made for gas by the United Gas, Electric Light and Fuel Company to the residents of the village of South Glens Falls has conferred this power by reason of the above provisions of law upon the public service commission and their action in dismissing the village's complaint was correct.

The Appellate Division based its decision upon the authority of *Matter of Quinby v. Public Service Comm.* (223 N. Y. 244). This case is not inconsistent or contrary to what is here stated. The matter there at issue was a railroad rate fixed by a city charter and contained in the street franchise to the company. We held that in view of article III, section 18, of the Constitution requiring the consent of the local authorities to the construction of a railroad that the power given to the public service commission to modify this rate should be distinctly and expressly conferred and that such power had not been given. It was said:

"In the absence of clear and definite language conferring without ambiguity jurisdiction upon the public

service commission to increase rates of fare agreed upon by the street railroad and the local authorities we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be. The Public Service Commissions Law (Section 26, section 49, subd. 1) and the Railroad Law (Section 181) deal with maximum rates of fare established by statute but make no reference in terms to rates established by agreement with local authorities." (p. 263.)

The question as to the power of the legislature to deal with such rates was specifically reserved and not decided. The opinion clearly intimated that such power did exist.

For the reasons here stated the order of the Appellate Division should be reversed and that of the public service commission dismissing the complaint affirmed. Costs to the appellant in this court and in the Appellate Division.

McLAUGHLIN, J. (concurring). I concur in the result reached by Judge CRANE.

The right to regulate rates of public service corporations is a governmental power vested in the state in its sovereign capacity. It may be exercised by the state, or through a commission appointed by it; or it may delegate such power to a municipality. The delegation of this power, however, is never implied since the effect is to extinguish, no matter for how short a time, *pro tanto* a power of the state. Therefore, when delegated its existence and the authority to make it must clearly and unmistakably appear. (*Matter of Quinby v. Public Service Commission*, 223 N. Y. 244.) Every doubt must be resolved in favor of the continuance of the power in the State (*Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265; *Wyandotte County Gas Co. v. Kansas*, 231 U. S. 622.)

Our attention has been called to no provision in the charter of the village of South Glens Falls by which it is claimed the power was given to such village to fix the maximum rate at which gas should be sold to consumers. It may be assumed that the charter gave to the village the right to make certain contracts necessary for its corporate existence, but this power did not include the right to make a contract fixing the rate at which gas should be sold to the public. When the franchise was granted to the United Gas, Electric Light and Fuel Company, both it and the village were bound to take notice of the right of the state to step in at any time and fix a rate other than that stated in the franchise. The legislature by the creation of the public service commission delegated to that body the power to fix a rate, and this it may exercise whenever it sees fit to do so notwithstanding the provision of the franchise fixing the maximum price for a term of fifty years. The act of the village and the gas company in thus contracting, while it may have been binding upon the parties to it, had no effect upon the power of the state acting through the public service commission to which has been delegated all the power the state has in fixing rates at which gas can be sold to the public. The whole act creating the public service commission indicates as clearly as language can that the legislature intended to give to that body all the power necessary to fix a rate at which gas could be sold throughout the state. Thus article 1, section 4, of the Public Service Commissions Law provides that the commission shall possess the powers and duties specified in the act but "also all powers necessary or proper to enable it to carry out the purposes of this chapter." Article 4, section 66, subdivision 5, provides that "whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such

person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges." And article 4, section 72, provides that after the hearing and after such investigation as shall have been made by the commission or its officers or agents "the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; * * *. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question. * * *"

It is true that in article 7, section 61, subdivision 2, of the Transportation Corporations Law (L. 1909, ch. 219) the right of a public service corporation to lay conductors for conducting gas through the streets of a city or village is given, but this right cannot be exercised without the consent of the municipal authorities "under such reasonable regulations, as they may prescribe." "Reasonable regulations" does not include the right to fix a rate so that the state cannot interfere and fix a different one. (*Wyandotte County Gas Co. v. Kansas, supra*; *Portland R., L. & P. Co. v. City of Portland*, 201 Fed. Rep. 119; *City of Benwood v. Public Service Commission*, 75 W. Va. 127; *Milwaukee Electric R. & Lt. Co. v. Railroad Commission*, 153 Wis. 592. See, also, *People ex rel. N. Y. & N. S. T. Co. v. Public Service Commission*, 175 App. Div. 869; *People ex rel. Bridge Operating Co. v. Public Service Commission*, 153 App. Div. 129.) If this view be correct, then it necessarily follows that there is at the present time lodged in the public service commission the power to fix a rate at which gas shall be sold by the appellant.

But it is urged that this view is in conflict with the one expressed in *Matter of Quinby v. Public Service Commission* (*supra*). I do not think so. On the contrary it seems to me that case is clearly distinguishable. There the question presented related to rates of a street surface railroad operating in the city of Rochester. Before the railroad company occupied the streets of the city it had to obtain the consent of the municipal authorities. The Constitution, as amended in 1875, so provided (Article 3, section 18). The consent was obtained but only on condition that the rate for one continuous ride should not exceed five cents per passenger. The condition thus imposed was accepted and the franchise granted by the city in 1890. In 1894 another contract was entered into between the city and the railroad company which ratified and confirmed the contract of 1890 as well as all ordinances relating to it. This contract was expressly recognized by the legislature in paragraph 173 of the Railroad Law (L. 1910, ch. 481); and in section 181 of the same law a provision was inserted which prohibits a railroad operating in any incorporated city or village from charging any passenger more than five cents for a continuous ride. In 1915 the legislature amended the charter of the city of Rochester and added a new section which provides that all street surface railroads operating cars in the streets of the city should not charge more than five cents per passenger for each continuous journey. In view of the constitutional provision requiring the consent of the local authorities, the agreement as to the maximum fare to be charged as a basis of the consent, the legislative recognition of the contract, and the act of 1915 fixing the maximum rate at five cents, this court held that it did not find in the Public Service Commissions Law that the state had delegated to the public service commission the power to increase the rate in excess of that agreed upon between the railroad company and the local

authorities, and that if the legislature had so intended then such intent should have been expressed in "clear and definite language."

In the present case there was no constitutional provision requiring the consent of the local authorities before the streets of the village could be occupied by the gas company. There has been no legislative recognition of the terms imposed as a condition of granting the franchise. No statute has been enacted fixing the maximum price at which gas can be sold. And it does appear from the Public Service Commissions Law that the legislature intended to and has given the commission the power either to increase or to decrease the price at which gas shall be furnished to the public.

The distinction thus made is not fanciful. It is real. It is substantial. In the *Quinby* case the intent on the part of the legislature to delegate the power to fix a rate could not be found, and there was a fair inference, at least, from legislative acts that such power had not been given but was retained by the state. In the present case the intent does appear. The statute creating the public service commission indicates as clearly as language can that the legislature intended to give to the commission all the power necessary either to increase or to diminish rates at which gas should be sold.

Entertaining these views I am of the opinion that the order of the Appellate Division should be reversed, etc.

CHASE, J. (dissenting). This court decided in the *Quinby* case (*Matter of Quinby v. Public Service Commission*, 223 N. Y. 244) that it was not the intention of the legislature by the Public Service Commissions Law to confer upon the public service commissions jurisdiction and power to raise the rate of fare that can be charged by a street railroad corporation to an amount in excess of the amount at which it had been expressly

limited by agreement between the street railroad corporation and the local authorities of the municipality in which the corporation is maintaining its road. In doing so, this court say: "In the absence of clear and definite language conferring without ambiguity jurisdiction upon the public service commission to increase rates of fare agreed upon by the street railroad and the local authorities we should not unnecessarily hold that the legislature has intended to delegate any of its powers in the matter, whatever its powers may be."

The decision in that case was confined to holding that the legislature did not intend to delegate its power, if any, relating to the increase of rates of fare of street railroads so agreed upon, to the public service commissions. Whether the legislature has the power, directly or by delegation to the commissions, to increase the rates of fare so agreed upon, was not passed upon in that case.

The case now before us involves a gas corporation and a price to be charged for gas in excess of a maximum price fixed and determined upon as a consideration for granting a franchise to the appellant by the local authorities and not an increase in the rate of fare to be charged by a street railroad corporation in excess of an amount fixed by a similar agreement. It is now sought to have this court hold that although the legislature did not intend to confer jurisdiction and power on the public service commissions to increase rates of fare agreed upon between street railroad corporations and the local authorities, it was the intention of the legislature to confer jurisdiction and power on such commissions to increase the price of gas similarly agreed upon between a gas company and the local authorities.

If such decision is to be made the difference of intention should be found in the act in "clear and definite language."

I do not find any substantial basis on which to distinguish the decision in the *Quinby* case to permit of

making a different decision in this case. The general power of the public service commissions relating to a gas corporation is the same as that relating to a street railroad corporation.

The Public Service Commissions Law provides that the public service commission for each district shall possess the powers and duties in the act specified, and also, "All powers necessary or proper to enable it to carry out the purposes" of the act. (Sec. 4.)

The Public Service Commissions Law (§ 26, § 49, subd. 1) and the Railroad Law (§ 181) deal with maximum rates of fare established by statute but make no reference in terms to rates established by agreement with local authorities. (*Matter of Quinby v. Public Service Commission, supra.*) The same is true of the Public Service Commissions Law (§ 66, § 71 and § 72) and the Transportation Corporations Law (§ 61).

In this case as in the *Quinby* case the question involved is the jurisdiction of the public service commissions to grant the particular relief to which the corporation involved deems itself entitled. The reasonableness of the rate of fare or of the price of gas to which the corporations respectively deem themselves entitled, has not been controverted in either case.

A comparison of the provisions of the Public Service Commissions Law relating specially to the power of the commissions over rates of fare to be charged by street railroad corporations, with those specially relating to such power over the price to be charged for gas, will show that the legislature did not clearly or otherwise express a different intention about the power of the commissions relating thereto. Section 49 specially relating to rates of fare to be charged by street and other railroad corporations is as follows:

"1. Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a com-

plaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed. * * *."

The sections specifically relating to the price to be charged for gas are as follows:

"* * *. Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges

thereafter to be in force for the service to be furnished notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed; * * *." (§ 66, subd. 5.)

" Upon the complaint in writing of the mayor of a city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of such gas or electricity in cities of the first or second class, or of not less than fifty in cities of the third class, or of not less than twenty-five elsewhere, or upon complaint of a gas corporation or electrical corporation supplying said gas or electricity, as to the illuminating power, purity, pressure or price of gas, * * *, the proper commission shall investigate as to the cause of such complaint. * * *." (§ 71.)

" Before proceeding under a complaint presented as provided in section seventy one, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section seventy-one of this chapter, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it. After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such

corporation or person, for the service to be furnished; and may order such improvement in the manufacture, distribution or supply of gas, in the manufacture, transmission or supply of electricity, or in the methods employed by such person or corporation, as will in its judgment be adequate, just and reasonable. The price fixed by the commission under this section or under subdivision five of section sixty-six shall be the maximum price to be charged by such person, corporation or municipality for gas or electricity for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years except in the case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation, person, or municipality interested, fix a higher or lower maximum price of gas or electricity to be thereafter charged. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies." (§ 72.)

Where the maximum rate of fare on street railroads and the price of gas have each been fixed by agreement with local authorities the public service commissions are equally restricted in their power and jurisdiction on their own motion or on complaint to authorize an increase of the same.

It is suggested that no statute has fixed the price of gas in South Glens Falls. It is for the reason that the price of gas has been fixed by agreement with the local authorities that the question involved on this appeal is controlled by the decision in the *Quinby* case. The

decision in that case was expressly placed upon the ground that authority is not given to the commission by the legislature to increase the amount of fare then in controversy above the maximum amount agreed upon as a condition of granting the railroad franchise.

It is also suggested that the constitutional provision (Constitution State of New York, art. 3, section 18) providing for the consent of certain owners of property and of the local authorities before a law shall authorize the construction of a street railroad, gives the commissioners greater power over the fare to be charged by a street railroad corporation than it has over the price to be charged for gas by a gas corporation.

The Constitution provides: "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the appellate division of the supreme court, in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

The constitutional provision prohibits any law authorizing the construction or operation of a street railroad except upon the condition therein stated but it does not in any way prescribe or limit the fare to be charged by a street railroad corporation. It does not in any way affect the question now before us relating to the power of the public service commission to increase the maximum rate of fare to be charged by a street railroad corporation,

or the price of gas to be charged by a gas corporation, over and above the amount agreed upon by the street railroad or gas company respectively and the municipality.

The decision in the *Quinby* case stands upon the words that I have quoted herein. It does not depend upon the constitutional provision. It is not affected by the constitutional provision unless perchance we reason as did the appellant in that case as recited in the opinion of Judge POUND as follows: "It would be a vain thing if the consent were placed under the protection of the Constitution, and the conditions which induced such consent were immediately subject to extinguishment *by the legislature* for that would mock the very purpose of the constitutional provision and permit almost any interference by the legislature; that the local authorities in this matter are supreme over the public service commission by virtue of the Constitution; that the obligation of a street surface railroad to carry passengers for an agreed fare may in a constitutional sense be neither a contract nor private property, but it is imposed by virtue of a delegated power, delegated by the people — not by the legislature — to the local authorities, and is thus beyond legislative recall." (p. 262.)

It was the contention of the appellant in that case that the legislature has no power in any case to increase rates of fare agreed upon by a street railroad and the local authorities. That question, I repeat, was not decided in that case. The language last above quoted was not adopted by the court or by the writer of the opinion.

Both cases should, in my judgment, stand upon the language quoted from the *Quinby* opinion to the effect that the legislature did not intend to delegate its power in cases where the rates of fare or price of gas have been established by and between the street railroad or gas companies respectively and the municipalities.

If we stand upon a distinction in the power of the

commissions as proposed, it may lead to the conclusion that so far as street railroads are concerned the legislature has no power to interfere in case of contracts such as that in Rochester and others of like effect because as suggested in the opinion in the *Quinby* case and as claimed by the appellants in that case, such contracts have passed beyond legislative recall.

The order should be affirmed, with costs.

HISCOCK, Ch. J., CUDDEBACK and McLAUGHLIN, JJ. (the latter in opinion in which also HISCOCK, Ch. J., concurs) concur with CRANE, J.; CHASE, J., reads dissenting opinion, in which COLLIN, J., concurs; HOGAN, J., dissents generally.

Order reversed, etc.

WATSON H. WHIPPLE, Respondent, v. BROWN BROTHERS COMPANY, Appellant.

Contract — execution of written contract purporting to be same as oral contract previously agreed upon by parties but guaranty of which was omitted in written contract — party induced to sign such contract by false statements of contents thereof by other party — action for breach of warranty of oral contract — when such action can be maintained and damages recovered.

1. There is a material and manifest distinction between a meeting of the minds of parties through deceit on the part of one of them, and a writing excusably and justifiably executed by the one which, through the deceit of the other, does not express the agreement of the parties.

2. A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery. There has been no intelligent assent to its terms, and it is a fraud in one who with knowledge of the facts attempts to enforce it.

3. The complaint alleges a contract by plaintiff's testator, its breach and resultant damages. The testimony of plaintiff's testator

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proved an oral contract, whereupon the defendant proved by him his signature to a writing in form a contract set forth in the answer. Plaintiff's testator testified that after the oral contract had been completely made he handed defendant's representative his list of varieties of trees he wanted, and defendant's representative wrote down the varieties, calling them as he wrote them, and handed the order to the witness to sign, who, because he had not his glasses, could read nothing of the writing and so stated to the representative, who said that it contained nothing but a statement of the varieties and the sizes and prices and time of delivery. In fact it differed materially from the oral contract. Plaintiff's testator thereupon signed it. This testimony was taken under the objection of the defendant that it was incompetent, that the writing was the best evidence of the contract and that no fraud was alleged in the complaint, and under an exception to the adverse ruling. The court, in effect, submitted to the jury the questions: (a) Was the testator bound by the written order, notwithstanding that he did not read it, or did the conditions justify him in signing it without reading it; (b) did the writing or the oral agreements constitute the contract; and charged that if the writing constituted the contract the plaintiff could not recover; if the oral agreements constituted the contract the plaintiff could recover the damages resulting to the testator from its breach. The verdict was for plaintiff. *Held*, that the evidence of the oral contract was properly received, and that upon the facts found by the jury the writing was void at law. The contract was not susceptible of rescission and there was no reason for its reformation. (*Wilcox v. American Tel. & Tel. Co.*, 176 N. Y. 115; *Smith v. Ryan*, 191 N. Y. 452, followed.)

Whipple v. Brown Brothers Co., 170 App. Div. 531, affirmed.

(Submitted October 22, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1915, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

P. Chamberlain for appellant. The court erred in receiving evidence tending to prove fraud. The action being for breach of contract it could not be changed into

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one for fraud. (*Dalrymple v. Hillenbrand*, 62 N. Y. 5; *Stumpf v. Cohen*, 78 Misc. Rep. 158; *Tanenbaum v. Fed. Match Co.*, 189 N. Y. 75; *Lindsay v. Mulqueen*, 26 Hun, 485; *Townsend v. G. Ins. Co.*, 39 Misc. Rep. 87; *Hartman v. Mayor, etc.*, 23 Hun, 586; *Northam v. Dutchess Co. Mut. Ins. Co.*, 77 N. Y. 73; *McComb v. Brewer Lumber Co.*, 184 Mass. 276; *Kipp v. N. Y. C. & H. R. R. R.*, 89 App. Div. 392; *Schoepflin v. Coffey*, 162 N. Y. 12; *Korn v. Weir*, 88 N. Y. Supp. 976; *Blumenfeld v. Stine*, 42 Misc. Rep. 411.) The court erred in admitting testimony as to dealings had between the alleged agent, Mull, and Mr. Sherwood. (*McKeige v. Carroll*, 120 App. Div. 521; *Ellenor v. Briggs*, 39 Misc. Rep. 535; *Oppenheim v. Irvin*, 166 App. Div. 233; *Wait v. Borne*, 123 N. Y. 592; *Smith v. Tracy*, 36 N. Y. 79.)

L. M. Sherwood for respondent. Parol evidence was competent to prove that the signature of the plaintiff to the instrument was procured by fraudulent representations, and if so, the instrument was void. (*Wilcox v. Am. T. & T. Co.*, 176 N. Y. 115; *Smith v. Dotterweich*, 200 N. Y. 299; *Burrows A. Mach. Co. v. Van Dusen*, 138 N. Y. Supp. 839; 19 N. Y. Supp. 951; *Wells v. Yates*, 44 N. Y. 531; *Albany Sav. Bank v. Burdick*, 87 N. Y. 40; *Peary v. Manhattan Elev. Ry. Co.*, 56 Misc. Rep. 599; 139 N. Y. 643; *E. A. Machine Co. v. Greenberg*, 56 Misc. Rep. 514; *Van Alstyne v. Smith*, 83 Hun, 382; *Kitchener v. Home Sewing Mch. Co.*, 135 N. Y. 182; *Philips v. Gorham*, 17 N. Y. 270; *Smith v. Ryan*, 191 N. Y. 452.)

COLLIN, J. The action was to recover the damages sustained by Watson H. Whipple, the plaintiff's testator, through the breach by the defendant of a contract between them. The complaint alleged the contract, its making and breach and the damages of the plaintiff, in amount \$1,600. It did not disclose whether the contract was oral or written. The answer denied the contract

and alleged another contract and performance of it by the defendant. It is, of course, true that the allegations in the answer of new matter are to be deemed controverted by the plaintiff. (Code of Civil Procedure, section 522.) The issue thus created was: Did the parties make the contract set forth in the complaint or did they make that set forth in the answer.

The testimony of Whipple (who was living at the time of the trial) proved the oral contract set forth in the complaint. The defendant, while Whipple was testifying as a witness in his own behalf, proved the signature of Whipple to a writing in form the contract set forth in the answer. Whipple testified: after the oral contract had been completely made, the representative of the defendant "took out his order book and I handed him my list and he wrote down the varieties (of trees), calling them out as he wrote them," and handed the order over to Whipple to sign; Whipple, because he had not his glasses, could read nothing of the writing and so stated to the representative, who stated that it contained nothing but a statement of the varieties and the sizes and prices and time of delivery. Whipple thereupon signed it. Such statement was not the entire of either the oral contract or of the writing. This testimony was taken under the objection of the defendant that it was incompetent, the writing was the best evidence of the contract, no fraud being alleged in the complaint, and under an exception to the adverse ruling. Under the writing the plaintiff could not maintain the action.

The issue tried was, was the oral agreement or the contents of the writing the real contract. The court, in effect, submitted to the jury the questions, (a) was Whipple bound by the written order, notwithstanding that he did not read it, or did the conditions justify him in signing it without reading it; (b) did the writing or the oral agreements constitute the contract; and charged

that if the writing constituted the contract the plaintiff could not recover; if the oral agreements constituted the contract the plaintiff could recover the damages resulting to the testator from its breach. It is manifest, therefore, that the recovery was because of the breach of the oral contract and not because of the defendant's fraud. The verdict was in favor of the plaintiff.

The appellant asserts and argues here that, the cause of action being founded on an express contract, fraud could not be proven without being alleged in the complaint.

Fraud was not a constituent of plaintiff's alleged or proven or submitted cause of action. The question was, did the stipulations of the written order constitute the contract. The jury were instructed that if the oral agreements were the contract the plaintiff could recover, if the evidence exonerated Whipple from negligence in signing the writing; if the writing constituted the contract the plaintiff could not recover. I think there was not error in this or in receiving the evidence of plaintiff that his signature to the writing was obtained, without negligence on his part, through deceit.

Under the evidence of Whipple the writing did not express the agreement of the parties. Whipple did not execute and deliver it with a contracting mind, and at the common law it was subject to the plea of *non est factum*. There is a material and manifest distinction between a meeting of the minds of parties through deceit on the part of one of them, and a writing excusably and justifiably executed by the one which, through the deceit of the other, does not express the agreement of the parties. The distinction has been expressed thus: "Fraud in the factum renders the writing void at law, whereas fraud in the treaty renders it voidable merely." In *Page v. Krekey* (137 N. Y. 307, 311) the action was upon a guaranty signed by the defendant. The court said: "In deter-

mining the legal effect of this paper, and the obligation thereby created against the defendant, we must assume that he signed it when intoxicated, that he was unable to read it, that he was ignorant of its contents, and that he fixed his signature to it upon the false representation that it was an application for a license. There can be no doubt that, as between the parties to this transaction, the instrument was void. It was also invalid in the hands of any person who received it with knowledge or notice of the circumstances under which the defendant's signature was obtained." In *Trambly v. Ricard* (130 Mass. 259) the action was for the conversion of furniture. Plaintiff alleged and proved the acts of conversion. The defendants, in justification of their acts, relied upon an alleged breach by the plaintiff of a conditional bill of sale. Plaintiff thereupon gave proof that the sale was absolute and that immediately after the oral agreement of absolute sale was made the defendants requested him to sign the written contract, which he did, supposing the same to contain the terms and stipulations of the oral agreement. The court said: "In the absence of fraud or imposition, it is presumed that the terms of a written contract were known and assented to by the parties who signed it; that they either read it, or were informed of its contents, or were willing to assent to its terms without reading it. This presumption is not defeated by showing that the contract signed was different from that which one or the other supposed he was signing. It is not permitted to show that another contract was the real contract, because the parties have chosen to put their agreement in writing, as the better way to preserve its terms, and parol evidence cannot be admitted to vary it. But this familiar rule does not exclude evidence which tends to show that the written contract was by some fraud or imposition never in fact freely and intelligently signed by the party sought to be charged. It

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may always be shown that he was not possessed of the requisite capacity, or that his signature was obtained by fraud. * * * A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery. There has been no intelligent assent to its terms, and it is a fraud in one who with knowledge of the fact attempts to enforce it." This case is cited with approval in *O'Donnell v. Inhabitants of Clinton* (145 Mass. 461); *Freedley v. French* (154 Mass. 339); *Bliss v. New York Central & H. R. R. Co.* (160 Mass. 447); *Larsson v. Metropolitan Stock Exchange* (200 Mass. 367).

In *Eldorado Jewelry Co. v. Darnell* (135 Iowa, 555) the defendant signed an order for the purchase of certain jewelry and upon this was sued for the price. When he signed the order he was without glasses, which had been broken, and could not read the order. He supposed that it was merely a contract under which he was to receive the goods as the property of plaintiff and dispose of them on commission with the obligation only to remit a percentage of the proceeds. The court said: "It is conceded that, if the order was voidable merely, as when procured by fraud, defendant had his election to rescind and refuse to accept the goods, or accept them and recoup in damages; but if, under the finding of the jury, the order was void, rescission was unnecessary to defeat plaintiff's claim. To render the order void, it must have been signed by mistake; that is, under the supposition that it was an instrument of another or different character. This would be no less a mistake because induced by fraud. The distinction should be kept in mind, for an agreement procured by fraud is voidable merely, while one signed by mistake is no agreement at all. * * *

As said, the jury might have found that the defendant

in signing the order was not negligent, as he was a man of advanced years, without his glasses, which had been broken, and could not read the instrument signed, which was long and in small type. The jury might also have found that he signed the same under a mistaken supposition that it was merely a contract under which he was to receive the goods as the property of plaintiffs, and dispose of them on commission, with the obligation to remit a percentage of the proceeds only. If so, executing the order was by a mistake, and the instrument utterly void. This must be so, for in such a case the minds of the parties have never met."

In *Cummings v. Ross* (90 Cal. 68) the facts, so far as the point under consideration is concerned, were the parallel of the facts in the case at bar, as will appear from the following quotation from the opinion: "It is further contended that the court below erred in allowing the plaintiff to show that a certain written contract introduced by defendant was signed by the plaintiff, through the misrepresentation of the defendant, and that the plaintiff had never intended to sign that contract, but supposed he was signing one which had before that been drawn up in lead-pencil. The action was brought on a contract such as the lead-pencil draught contained, and the defendant, in the answer, denied the performance of the contract as sued on. When he introduced the written contract to show the real nature of the transaction as he claimed, it was competent for the plaintiff, in support of the issue made, to show that in point of fact he had made no such contract as defendant had brought forward in evidence. One cannot be made to stand on a contract he never intended to make. If the defendant had sued the plaintiff, and sought to charge him on such a contract, it would certainly be competent, in defense, to show that the instrument was fraudulent."

I have referred to these decisions, by the quotations,

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to make clear that the principles declared by us in *Wilcox v. American Telephone & Tel. Co.* (176 N. Y. 115) and *Smith v. Ryan* (191 N. Y. 452) are of general application. Those principles as stated by Chief Judge CULLEN are: "There are two kinds of fraud which differ essentially in their character; in the one the grantor is induced to convey his property by fraudulent representations as to the value, nature or character of the consideration he receives for the conveyance. This is sometimes called fraud in the consideration. In the other case the grantor is deceived into the execution of an instrument of the contents of which he is ignorant. This is sometimes called fraud in the execution of the deed. The distinction between the two cases lies just here. It is elementary law that the assent of the parties is necessary to constitute a binding contract. In the first case the assent of the party though obtained by fraud is, nevertheless, obtained not only to the execution of the instrument, but to the contract which it evidences. In the second case there is procured only the signature to and execution of the written instrument, but not assent to the contract therein stated. In cases of this latter class the deed can be avoided at law." "Thus, for example, reading a deed falsely to an illiterate person, whether it be so read by the grantee or by a stranger, avoids it as to the other party at law." (*Smith v. Ryan*, 191 N. Y. 452, 457.) "The practice adopted by the plaintiff was entirely proper. He was not obliged to appeal to a court of equity for relief against the deed, but when it was set up to defeat his claim he could avoid its effect by proof of the fraud by which it was obtained (*Kirchner v. New Home Sewing Machine Co.*, 135 N. Y. 182)." (*Wilcox v. Am. Tel. & Tel. Co.*, 176 N. Y. 115, 118.) (See, also, *Lotter v. Knospe*, 144 Wis. 426; *Biddeford National Bank v. Hill*, 102 Me. 346; *Black v. Wabash, St. Louis & Pacific Railway Co.*, 111 Ill.

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351; *Warder, Bushnell & Glessner Co. v. Whitish*, 77 Wis. 430; *Alexander v. Brogley*, 63 N. J. L. 307.)

The writing in the case at bar lacks the element of mutual assent. It does not express the result of the meeting of the minds of the parties. It is a mere fiction, a nothing or a something which becomes nothing the instant the proof of the deceit under which the signature was made is given. Whipple did not and could not sue upon the writing. Under his proof it was void at law — the same as if it never had been. It, as a contract, was not susceptible of rescission and there was not a reason for its reformation. The plaintiff controverted its existence as a contract and he had the right by evidence to sustain the controversion.

The judgment should be affirmed, with costs.

CRANE, J. (concurring). Through the defendant's agent the plaintiff ordered certain peach trees of a specified name and variety. The nature of the peach tree business is such that the kind of fruit which will grow upon the tree cannot be definitely determined until about three years after planting. The order was reduced to writing by the defendant's agent and the plaintiff's signature obtained upon the assurance that the alleged contract was in accordance with the previous oral understanding. As the plaintiff did not have his spectacles with him at the time he did not read the contract, relying upon this representation of the seller. The trees received from the defendant in the natural course of time proved to be different from those ordered and much less in value. The purchaser brought action against the seller for his damage. It then turned out that the contract which he had signed was not in accordance with the oral agreement as it contained a limited warranty about which nothing had been said. He was deceived by the agent into signing a written paper to

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the contents of which he had never assented. The action, having been brought upon the oral agreement, the defendant pleaded the written contract and upon the trial objected to any evidence which attempted to vary it. The defendant claimed that the plaintiff was bound by the writing and could not in this action prove it to be void for fraud and recover upon the oral arrangement.

The trees, it was admitted, were not the kind ordered, and the plaintiff's damage was satisfactorily proved. The court admitted evidence of the fraud and held that if this were established the plaintiff was not bound by the writing. The question apparently raised by this appeal from a judgment against the defendant is whether the plaintiff can sue at law upon his oral agreement with the agent and prove when confronted in pleading and upon the trial with the alleged writing that it was not a contract as he was deceived into signing a paper other than that intended by the parties. Or must he resort to equity to reform the writing by having the limited warranty stricken out. My associates have divided on these propositions.

I am convinced that the courts below have applied the law as it has found expression in the authorities.

It must be conceded that if the paper were a forgery the plaintiff could sue at law upon the oral agreement and prove the forgery when the alleged contract was produced to bar his claim; so also if his signature were genuine, but he signed it upon the representation that the paper was something other than a contract, for instance, a receipt or a permit. There would be nothing in these instances to reform.

If the writing purports to be a contract, but, by the fraud of one, is *materially different* than the parties have agreed to, is this any more binding than the forgery or trick paper? To what have the minds met to form a contract? Had the writing in this case by deception

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ordered sheep instead of trees would the reformatory powers of equity have been required to give the purchaser damages for bad trees? The rule seems to be that where a party is tricked into signing a contract the material parts of which are not in accordance with the oral agreement such a paper is not a contract, but is void. It is void until in some way affirmed by the party deceived. Some cases speak of it as voidable, by which they mean that the party may, if he choose, affirm and adopt it, while a contract which is voidable only is good till disaffirmed. (*Standard Manufacturing Co. v. Slot*, 121 Wis. 14.)

The difficulty has arisen, I believe, through a misunderstanding of the rule of evidence that written contracts cannot be varied by parol testimony. This rule only applies to such writings as are contracts in fact or in law, but never prevents oral testimony showing that through fraud there is *no* written contract. Thus in *Black v. Wabash, St. Louis & P. Ry. Co.* (111 Ill. 351) it was said regarding evidence of an oral agreement with an agent which was excluded on the trial:

"The object of the excluded evidence was not to change the terms of an agreement which was admitted to have a valid existence, but rather to show that by reason of the circumstances under which it was obtained it was in legal effect no agreement at all."

Wharton on Evidence, section 931, states it this way:

"It is also always admissible for a party to show that his execution of a contract was induced by fraud or compulsion.

"Before the rules excluding parol testimony to vary documents can be applied, we must determine a document legally exists."

Western Manufacturing Company v. Cotton & Long (126 Ky. 749) says this:

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"Where a person by ostensibly reading a contract to another obtains his signature to an agreement materially different from the reading, it is a fraud which invalidates the contract." * * * "When by fraud or misrepresentation a written memorial of a contract *essentially variant* from the agreement actually made shall have been imposed on a party, the deed or writing is not his. It is not obligatory. And in such cases the fraud or misrepresentation may be proved without contradicting the written evidence." (Cited from *Tribble v. Oldham*, 5 J. J. Marsh. 142.)

That a deception as to a material part of a writing is as fatal as a misrepresentation of the whole paper or of its nature is made plain by the following authorities: *Maxfield v. Schwartz* (45 Minn. 150); *Gibbs v. Linabury* (22 Mich. 479); *Stacy v. Ross* (27 Texas, 3); *Black v. W. St. Louis & P. Ry. Co.* (*supra*); *Eldorado Jewelry Co. v. Darnell* (135 Iowa, 555); *Trombly v. Ricard* (130 Mass. 259); *Beck & Pauli Lithographing Co. v. Hauppert & Worcester* (104 Ala. 503); *Foster v. MacKinnon* (L. R. 4 Com. Pleas, 704).

The case of *Cole Brothers & Hart v. Williams* (12 Neb. 440) is somewhat in point. The plaintiff sued for goods sold and alleged a deduction of \$100 for lightning rods purchased from the defendant. The defendant set up a written contract whereby the price of the lightning rods agreed to be paid by the plaintiff was \$424.25. The plaintiff replied by saying that he did sign a certain pretended written agreement concerning rods but that he was deceived by the agent into believing that it made no mention of price. A verdict for the plaintiff was sustained upholding his oral contract for \$100 only.

Through all these cases we find the principle enunciated that where a paper has been signed by a party which purports to be his contract, but which is different from the agreement actually made in a material part, and he

has been fraudulently deceived into believing that the writing is in accordance with the spoken words, there is no contract. It is void; there has been no meeting of the minds; it may be disregarded and the plaintiff may recover or defend according to the contract orally made. Reformation is unnecessary. The rule that a written contract cannot be varied by parol evidence is not applicable. The party seeks not to establish the written contract with changes but to prove that there was no written contract through the fraud of the party claiming it.

And if the writing be void as a contract the party may sue at law for damage in a case such as we have here.

The plaintiff bought trees of the defendant. It was necessary to wait three years after planting to ascertain whether he got what he purchased. They proved inferior trees. He could not return them and was entitled to his full damage, not merely the return of the purchase price. (*White v. Miller*, 71 N. Y. 118.) No writing was necessary to establish his claim, but it was important to the defendant if this common-law liability had been limited by agreement. The defendant set up such an agreement in writing. The plaintiff could meet it by showing that his signature because of fraud was in law no signature and the paper no contract.

To this effect we find the cases of our own state. *Smith v. Ryan* (191 N. Y. 452, 457) was an action of ejectment wherein the defense set up a deed and the plaintiff met it by proof that the grantor was insane at the time it was executed and, therefore, was no deed. CULLEN, J., said:

“There are two kinds of fraud which differ essentially in their character; in the one the grantor is induced to convey his property by fraudulent representations as to the value, nature or character of the consideration he receives for the conveyance. This is sometimes called

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fraud in the consideration. In the other case the grantor is deceived into the execution of an instrument of the contents of which he is ignorant. This is sometimes called fraud in the execution of the deed. The distinction between the two cases lies just here. It is elementary law that the assent of the parties is necessary to constitute a binding contract. In the first case the assent of the party though obtained by fraud is, nevertheless, obtained not only to the execution of the instrument, but to the contract which it evidences. In the second case there is procured only the signature to and execution of the written instrument, but not assent to the contract therein stated. In cases of this latter class the deed can be avoided at law."

Wilcox v. American Telephone & Telegraph Company (176 N. Y. 115, 118) was a case where the defendant produced a paper giving it a right to use the plaintiff's land for the erection of its poles. The plaintiff in his action of trespass showed that it had been obtained from him under the false assertion that it was a receipt. Here concededly there was no contract. It was said:

"The plaintiff does not attempt to rescind a contract as induced by fraud; the charge by him relates, not to the contract, but to the instrument which purports to represent the contract."

In *International Ferry Company v. American Fidelity Company* (207 N. Y. 350, 353) an oral agreement was made for insurance. The policy subsequently delivered reducing the contract to writing through fraud did not contain the agreement. The court said:

"The representations fraudulently made by the defendant did not affect the actual contract. That remained effective and could have been enforced by the plaintiff, in a proper action, in accordance with its provisions and conditions."

A release was pleaded by the defendant in *Kirchner v.*

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New Home Sewing Machine Company (135 N. Y. 182, 189), to bar the plaintiff's recovery. It was said that, without a reply, plaintiff could meet this release by showing that through fraud or mistake his cause of action was included in the release when it should not have been.

"Generally speaking," says the court, "whatever proofs would be regarded as sufficient to enable the plaintiff to maintain an action for the reformation of the release, so as to except from its provisions the demand in suit, would be available to him in this action by way of avoidance of its terms."

A distinction has been sought between the kind of writings involved. It is said that many of these cases apply to releases or receipts or papers never intended as contracts and that such may be avoided at law for fraud but that a paper which reads like a contract is always a contract till touched by equity provided only that the parties intended a writing to express their intention. The fact that through the fraud of one the intention is not expressed is silenced at law by the oral evidence rule.

I cannot believe that such a distinction exists. Fraud is a great leveler, before it all forms fall and the principle which the authorities enunciate is not determined by the kind of paper in question but by the evil of deception and overreaching. All instruments of every nature come under the same principle. Where through deception a paper is signed which was never intended by the parties, it is no contract, no deed, no release, no receipt.

In certain instances equity may provide the only relief. Where a party seeks not to avoid a writing but to establish it because otherwise he would have no claim at law — contracts or grants required by statute to be in writing — equity must reform as it is the only remedy.

Reason also indicates that a party under the circumstances of this case should not be compelled to go into equity to seek reformation in order to recover.

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We all agree that the plaintiff if tricked and deceived into signing a paper which is not his contract is entitled to some form of relief. This is his right, a substantive right. The manner in which this right shall be enforced merely applies to the procedure. The disagreement between my associates is over procedure and not a substantive right. It is said that the plaintiff should set out the transaction in full and ask for a reformation. What would he plead? He would plead the oral agreement, the alleged written contract, the deception and his damage. He would ask for reformation and for judgment in accordance with his reformed contract. All of this can be done in one action and tried before a jury. (*Maier v. Hibernia Insurance Co.*, 67 N. Y. 283.)

What does he do in his action at law. He pleads the oral agreement and sets forth his damage. The defendant sets up the written contract and may demand a reply thereto. (Code of Civil Pro. section 516.) The plaintiff replies setting up the deception and fraud.

So that we have in both actions all the facts on paper before the trial proceeds except in the equity action they are contained in one paper and in the action at law they are set forth in three. In both the burden of proof and the evidence is the same.

In either case the parties may be fully informed regarding the claims of each. I can see no difficulty in permitting the plaintiff to consider the writing as void for fraud in an action at law when it is conceded that he may always plead the fraud as a defense when sued in law or equity. In equity the issues may be tried by a judge without a jury, and at law by a jury only, but there is no greater virtue in a trial by a judge than a trial by jury or *vice versa*. Both are presumed to find the truth and this presumption is conclusive.

All my associates apparently have assumed that the written contract in this case barred the plaintiff's recovery.

There is a difference between the limitation of *warranty* and the limitation of *liability*. The contract limits the warranty but does not limit the liability for the breach of that warranty. It says:

“Any stock which does not prove to be true to name as labeled is to be replaced free or purchase price refunded, *but is not further warranted.*”

The warranty, therefore, is restricted to the name or kind of peach tree ordered. If the trees turn out to be other than ordered the warranty is broken, but the liability for the broken warranty is not limited not even to the return of the price or replacement of the trees. All other warranties are excluded by the limitation. For instance there is no warranty that the trees will live for three years, or that they will bear fruit at the end of three years, or that they will give a certain amount of fruit, or that any other condition exists known to the peach tree trade. The warranty is limited to the kind of peach tree ordered. But when this warranty is broken the plaintiff may recover his full damage as there is no limit of *liability* for a breach of the *limited warranty*. We held in *Sandford v. Brown Brothers* (208 N. Y. 90) that the words “is to be replaced free or purchase price refunded” did not limit the liability. Therefore, they do not limit the liability in this contract. The only words added to the contract as found in the *Sandford* case are the words, “*but is not further warranted.*” As stated this is not a limit of liability, but a mere limit of warranty. In the *Sandford* case it was stated that the defendants could limit *liability* by any appropriate words clearly and distinctly stating it. Such are not the words in question.

Conceding, therefore, that the plaintiff was bound by the written contract, yet he can recover as the limited warranty as to kind was concededly broken, and his damage fully proved. The judgment in his favor must be affirmed anyway. It may be said that this was not the

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rule of the case as applied below. The defendant cannot plead any such objection as it would not be as well off under the rule here stated as that given by the trial court. The judgment for the plaintiff, therefore, must be affirmed, with costs.

McLAUGHLIN, J. (dissenting). This action was brought by plaintiff's testator to recover damages for the breach of a contract. The complaint alleged, in substance, that plaintiff is a farmer and fruit grower owning and residing on a farm in the town of Ridgeway, in the county of Orleans, N. Y.; that on or about the 4th day of November, 1909, plaintiff and defendant entered into a mutual contract whereby it sold to him 405 first-grade peach trees of the following varieties: 200 Albertas; 100 Early Crawford, and 105 Chares Choice, at the agreed price of 10 cents per tree, and promised to deliver same in good condition at the station at Medina, N. Y., on the New York Central and Hudson River Railroad, during the months of March, April or May, 1910; that plaintiff, on his part, purchased said trees from defendant and promised and agreed to accept and pay for them; that at the time of making said contract the parties talked over, considered and agreed that the trees were specially selected, profitable and desirable varieties for plaintiff to plant on his farm in the spring of 1910, and grow for an orchard; that instead of delivering the peach trees set forth and described in said agreement, defendant committed a breach of said contract by failing to deliver any of said trees to plaintiff at the time and place named, but instead thereof delivered different and worthless varieties; that it was impossible to tell by inspection and examination at the time the trees were delivered, and plaintiff did not know, that the trees were not peach trees of the varieties contracted for and he received and planted them on his farm relying on defendant's

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agreement; that plaintiff first discovered in the fall of 1913 that defendant had substituted other varieties of trees for those purchased; and by reason thereof damages to the amount of \$1,600 had been sustained, for which judgment was demanded.

The answer admitted substantially all the allegations of the complaint, except that the trees delivered did not correspond to those agreed to be sold, and that plaintiff had been damaged, which were denied. It also alleged, affirmatively, that by the terms of said contract the trees were not warranted in any manner, but it was agreed if the same were not true to name they might be replaced or the money paid therefor refunded; that plaintiff has never permitted defendant to refund said money, replace said trees or notified it that the trees were not true to name; and asked that the complaint be dismissed.

The plaintiff had a verdict for a substantial amount, upon which judgment was entered, and from which an appeal was taken to the Appellate Division, where the same was affirmed and defendant appeals to this court.

At the trial it appeared from plaintiff's testimony that some time in October he had a talk with one Mull, defendant's agent, with reference to buying fruit trees; that as a result, on or about the 4th of November, 1909, he signed an order for the trees mentioned in the complaint, copy of which was then given to him and which he has since retained; that he did not have his glasses and, therefore, could not read the order, but relied on the statement of Mull that it contained nothing but a statement of the varieties, sizes, price and time of delivery of the trees. The complaint was not amended, nor a reformation of the contract asked. The order was put in evidence by the defendant and contained, among others, this provision: "Any stock which does not prove to be true to name as labeled is to be replaced free or purchase price refunded, but is not further warranted * * *."

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The trial proceeded and the case was finally submitted to the jury under the claim of the defendant, on the one hand, that whatever talk was had in the first instance between plaintiff and Mull was thereafter reduced to writing and plaintiff was bound thereby, and on the other hand, the claim of plaintiff that he was induced to sign the writing by reason of the false and fraudulent statement made by Mull. The learned justice was requested to charge the jury that the written contract was the only one between the parties which could be considered by it, under the allegations of the complaint. This was refused and an exception taken, the court charging that if the jury reached the conclusion that plaintiff's signature to the contract was obtained by false and fraudulent statements made by Mull, then he was thereby relieved from the provision quoted and could recover under the oral contract. The exception to the admission of evidence tending to establish fraud and the charge permitting the jury to award damages under an oral contract, in case it found that the signature to the order was obtained by fraud, present the principal questions to be determined by this appeal.

The action was to recover upon the breach of a contract alleged to have been made on or about the 4th of November, 1909. That contract was in writing, but under the instruction of the court the jury has found that plaintiff is not bound by it since his signature thereto was obtained by fraud and a recovery has been had upon an alleged oral contract. There was no allegation in the complaint that plaintiff's signature was obtained by fraud and yet he was permitted to offer proof from which the jury found such fact.

Discussion or the citation of authorities is unnecessary to show that a party cannot allege one cause of action in his complaint and then, without an amendment, at the trial recover upon another. The purpose of a pleading

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is to notify the adverse party in advance of the trial just what his adversary claims. A pleading is to be liberally construed. Technical rules relating thereto no longer prevail, but the rule does remain that a party cannot come into court asserting one cause of action and recover on another. If he could, then the pleading, instead of serving a useful purpose, by notifying the adverse party what he might expect to meet at the trial, would only mislead and deceive him. (*Northam v. Dutchess County Mut. Ins. Co.*, 177 N. Y. 73; *Reed v. McConnell*, 133 N. Y. 425; *Truesdell v. Sarles*, 104 N. Y. 164; *Southwick v. First National Bank of Memphis*, 84 N. Y. 420; *McClung v. Foshour*, 47 Hun, 421; *affd.*, 113 N. Y. 640.)

Once a contract has been reduced to writing and executed all prior oral negotiations are merged therein and the rights of the parties must be determined by its terms. It cannot be contradicted, qualified or destroyed by oral negotiations which induced its execution. This rule is so well recognized and firmly established that the citation of authorities is unnecessary. If the instrument as executed fails to conform to the agreement between the parties in consequence of a fraudulent misstatement as to its contents, or a mutual mistake, however induced, or the mistake of the one and the fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement. (*Albany City Savings Instn. v. Burdick*, 87 N. Y. 40; *International Ferry Co. v. American Fidelity Co.*, 207 N. Y. 350.) But a reformation can only be had where an issue is formed by the pleadings for that purpose. A contract induced by fraud as to a matter material to the party defrauded is not void, but voidable. (*Adams v. Gillig*, 199 N. Y. 314.) It may, for that reason, be reformed. (*Welles v. Yates*, 44 N. Y. 525; *Albany City Savings Instn. v. Burdick*, *supra.*)

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I know of no authority which permits a party, after he has entered into a written agreement, to decide for himself that such agreement is void and successfully maintain an action on a prior oral agreement. If this can be done then a written contract serves no purpose whatever, since all a party has to do is to declare generally upon a contract and when the written one is produced, offer evidence that his signature thereto was procured by fraud. One who has been induced to purchase property by fraudulent representations, has, upon discovery of the fraud, three remedies, any of which he may elect to pursue: (a) Rescind the contract absolutely and sue in an action at law to recover the consideration parted with. To succeed in such action he must allege and prove that he has restored, or offered to restore, to the other party whatever may have been received by him under the contract (*Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75); (b) bring an action in equity and there obtain full relief. (*Allerton v. Allerton*, 50 N. Y. 670.) Such action is based not upon a rescission, but for a rescission, and it is necessary for the plaintiff, in order to succeed, to offer in his complaint to return what he has received and make a tender thereof on the trial; (c) retain what he has received and bring an action at law to recover the damages sustained. Such action is based upon an affirmation of the contract and the measure of the recovery is the difference between the article sold and what it would have been according to the representations. (*Vail v. Reynolds* 118 N. Y. 297; *Krumm v. Beach*, 96 N. Y. 398.)

Certain cases are called to our attention, which it is claimed sustain the ruling of the trial judge: *Wilcox v. American Tel. & Tel. Co.* (176 N. Y. 115); *Smith v. Ryan* (191 N. Y. 452); *Trambly v. Ricard* (130 Mass. 259); *Eldorado Jewelry Co. v. Darnell* (135 Ia. 555); *Lotter v. Knospe* (144 Wis. 426); *Biddeford Nat. Bank v. Hill* (102 Me. 346), and *Cummings v. Ross* (90 Cal. 68). All but one of these

(the California case) fall into one of three classes: (1) Where the plaintiff's recovery is sought to be defeated by a written instrument which is set up in the answer. The legal existence of such instrument, no reply being required, is denied by the plaintiff. Hence an issue is formed as to the validity of such instrument which can be tried in the action; (2) where the action is brought upon a contract, the validity of which is denied in the answer, or (3) where releases or receipts upon their face purport to extinguish the cause of action alleged. In such case the plaintiff is permitted to prove that the release or receipt was fraudulently obtained and for that reason never had any legal effect. This is upon the theory that neither a receipt nor a release is a contract or an executory instrument. They are mere declarations or admissions in writing (*Stiebel v. Grosberg*, 202 N. Y. 266) and being such may be contradicted or explained.

In the California case an issue was presented by the pleadings as to the validity of the contract involved. The action was brought to foreclose a mechanic's lien for work done in the construction of a building. An issue was raised as to the performance of the work alleged to have been done under the contract described in the complaint. The answer alleged another contract, including extra work sued for by the plaintiff upon a *quantum meruit*. It was held that it was competent for the plaintiff, when such other contract was introduced in evidence by the defendant, to show in rebuttal that he signed it under the defendant's fraudulent representation. The defendant having alleged the existence of the other contract to defeat plaintiff's claim, and no reply being required, its validity was put in issue.

In the present case the plaintiff in his complaint did not ask for a recovery based on the breach of an oral contract made in October; on the contrary he alleged the contract was made on or about the 4th of November,

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which turned out to be in writing. If it did not correctly represent the terms of the agreement, due to the fraudulent statement of the defendant's agent, then plaintiff's remedy was to ask to have it reformed. That could not be done under the complaint in its present form. The complaint had to be amended so as to present that issue, the trial of which would be by the court without a jury.

The judgment appealed from should be reversed and a new trial ordered, with costs to appellant in all courts to abide event.

CUDDEBACK and HOGAN, JJ., and CRANE, J. (in opinion) concur with COLLIN, J., for affirmance; HISCOCK, Ch. J., and CHASE, J., concur with McLAUGHLIN, J., for reversal.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ATTILIO DE SIMONE, Appellant.

Crimes — appeal — non-unanimous decision of Appellate Division affirming a judgment of conviction — Court of Appeals must examine record to ascertain whether there is evidence tending to support verdict of guilty — evidence — erroneous reason for receiving competent and admissible evidence not sufficient ground for reversal of judgment — when statements made by witness admissible as explanatory of the conduct and acts of the witness.

1. Where a decision of the Appellate Division affirming a judgment convicting a defendant of murder in the second degree is not unanimous the Court of Appeals must examine the record to ascertain, as a question of law, whether there is evidence tending to support the verdict of guilty, and also to ascertain whether any alleged error, raised by an exception at the trial, has validity.

2. Where evidence is competent and admissible it is immaterial that an improper ground for receiving it was stated, and a judgment convicting a defendant of murder in the second degree will not be reversed for such alleged error.

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3. Upon the trial of defendant herein a police officer who helped in the arrest of the defendant testified that, hearing a shot, he was running to the place from which the sound came and as he reached a street corner "somebody in the crowd hollered, 'He ran over Houston Street,'" and looking he saw the defendant running and followed him, overtaking him as another officer stopped him. He found upon the ground near the defendant the pistol which was introduced in evidence. Defendant's counsel objected to the statement of the witness that "'somebody in the crowd hollered,' as incompetent, irrelevant and immaterial, hearsay in the absence of this defendant and not binding on the defendant." The court overruled the objection on the ground that the testimony was part of the *res gestæ*. Held, that the testimony, although hearsay, was competent, not as of the *res gestæ*, but as part of the relevant explanation and description of the acts of the witness, in acquiring the testimony given by him.

People v. De Simone, 181 App. Div. 840, affirmed.

(Argued October 30, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 1, 1918, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of murder in the second degree.

The facts, so far as material, are stated in the opinion.

Frank Moss, Isidor Wels and Caesar B. F. Barra for appellant. The court improperly admitted evidence of remarks by a stranger on the street, after the alleged homicide. (Chamberlayne on Evidence, § 2597; *Bradshaw v. Commonwealth*, 10 Bush [Ky.], 576; *State v. McCoy*, 111 Mo. 517; *Campbell v. State*, 30 Tex. App. 645; Bishop's New Crim. Pro. [2d ed.] § 1087; *Flynn v. State*, 43 Ark. 289; *Fittin v. Sumner*, 163 N. Y. Supp. 443; 176 App. Div. 617; *Greenfield v. People*, 85 N. Y. 75. *People v. Decker*, 143 App. Div. 590; *Homer v. Everett*, 91 N. Y. 641; *Ex parte Kennedy*, 57 S. W. Rep. 648; Wharton's Crim. Evidence [10th ed.], § 270; *People v. Marendi*, 213 N. Y. 600.)

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Edward Swann, District Attorney (Robert C. Taylor of counsel), for respondent. In view of Harson's testimony, the bystander's utterance was receivable to show why Harson changed his course and acted as he did. (*People v. Taylor*, 36 Hun, 639; 3 N. Y. Crim. Rep. 297; 101 N. Y. 608; *People v. Prince*, 143 App. Div. 524; *Coleman v. People*, 58 N. Y. 555; Cowen & Hill's Notes [ed. 1839], 562, n. 432; Wigmore on Ev. §§ 416, 655, 730, 1130, 1791; *People v. Lindsay*, 63 N. Y. 143; *People v. Robinson*, 163 App. Div. 853; 212 N. Y. 569.) The utterance was a verbal act, and admissible as part of the *res gestæ*, so called. (Bish. New Crim. Pro. [2d ed.] § 1086; Chamb. Mod. Law of Ev. § 2597; Wigmore on Ev. § 1755; *Milne v. Leisler*, 7 H. & N. 786; *Lord George Gordon's Case*, 21 How. St. Tr. 542; *People v. Most*, 128 N. Y. 108; *Hine v. N. Y. El. R. Co.*, 149 N. Y. 154, 162; Greenl. on Ev. §§ 108, 109; *Messmer v. H. W. Boettger Silk F. Co.*, 160 App. Div. 519; Wigmore on Ev. § 1770; *Hallahan v. N. Y., L. E. & W. R. R. Co.*, 102 N. Y. 194.)

COLLIN, J. The defendant was convicted by the verdict of a jury of murder in the second degree, in that he shot and killed Alexander Della Rosa. The judgment of conviction was affirmed by the non-unanimous decision of the Appellate Division. Because the decision of the Appellate Division was not unanimous we must examine the record presented to us to ascertain as a question of law whether there is evidence tending to support the verdict. (*People v. Smith*, 162 N. Y. 520.) We must, additionally, ascertain whether any alleged error raised by an exception at the trial has validity. (*People v. Grossman*, 168 N. Y. 47; *People v. Sherlock*, 166 N. Y. 180.)

It is manifest in an examination of the record that there was evidence from which the jury were justified in finding the defendant guilty of the crime of which he

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was convicted. That conclusion is not, and could not be, seriously combatted by the briefs and argument of his counsel. He does, however, urge before us several alleged errors. We have concluded that one only of them merits discussion in an opinion, the facts relative to which are: The shooting occurred on July 25, 1916, at about seven o'clock and fifteen minutes in the afternoon on the west side of Thompson street in the city of New York. Thompson street runs north and south. At the distance of about eighty feet south from the place of the shooting, Thompson street is intersected by West Houston street, running east and west. The People had as a witness in their behalf Charles R. Harson, who testified: At the time of the shooting he was a police officer on duty on Thompson street; while standing on the east side of that street at a point about seventy-five feet south of West Houston street he heard the firing of five or six shots at a point on the west side of Thompson street and north of West Houston street; he immediately ran to the north, crossing Thompson street from the east to the west side diagonally as he ran; in crossing a wagon in front of him barred his view of Thompson street to the north; as he, having crossed West Houston street, was at a point on the west side of Thompson street about ten feet north of the northwest corner of those streets somebody in the crowd hollered, "He ran over Houston Street;" he immediately turned and looked over West Houston street and saw, for the first time, about twenty-five feet from that corner and running westerly in that street, the defendant, whom he pursued; he did not notice, at that time, any one else running westerly on that street; when he reached the defendant another officer had stopped him; he found upon the ground near the defendant the pistol which was introduced in evidence. When, in giving his testimony, he had said that "somebody in the crowd hollered" the defendant's counsel objected to

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his stating what was said "as incompetent, irrelevant and immaterial, hearsay in the absence of this defendant and not binding on the defendant." The court overruled the objection, stating: "I think it may be stated that he heard shots and ran. I think it is part of the *res gestæ*." The defendant excepted to the ruling.

We have concluded that the testimony thus objected to was competent, not as of the *res gestæ*, but as a part of the relevant explanation and description of the acts of the witness.

The testimony is manifestly hearsay. The main or principal transaction being investigated and adjudged, through and by virtue of the trial, was the shooting, the circumstances and conditions attendant upon or surrounding it and was it done by the defendant under those circumstances and conditions. In the investigation, deeds and statements of the participants in the transaction, or of observers of it, which accompanied, emanated from and were a part of it, could be detailed by witnesses who saw or heard them. Deeds and acts which explain, describe or characterize the transaction as an accomplished act are to be distinguished from those which are a part of it and are forced or brought into utterance or existence by and in the evolution of the transaction itself, and which stand in immediate causal relation to it. The former are hearsay and not competent as evidence; the latter are of the *res gestæ* and are relevant and competent. In these cases the statements of observers of the criminal act have been held incompetent as not of the *res gestæ*: *Flynn v. State* (43 Ark. 289); *State v. Oliver* (39 La. Ann. 470); *State v. Bellard* (50 La. Ann. 594); *State v. Riley* (42 La. Ann. 995); *Ganaway v. Salt Lake Dramatic Assn.* (17 Utah, 37); *State v. Walker* (78 Mo. 380); *Stroud v. Commonwealth* (14 Kentucky Law Rep. 179). In these cases the statements of observers of the criminal act have been

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held competent as of the *res gestæ*: *Lander v. People* (104 Ill. 248); *State v. Kaiser* (124 Mo. 651, 666); *State v. Walker* (78 Mo. 380); *State v. Gabriel* (88 Mo. 631); *State v. McCourry* (128 N. C. 594); *State v. Biggerstaff* (17 Mont. 510); *State v. Duncan* (116 Mo. 288); *State v. Desroches* (48 La. Ann. 428).

It is unnecessary to analyze or state the principles applied in those cases. The admissibility of the testimony under consideration is not determined by them. It does not appear that he who called out saw the shooting or knew that the man who ran over Houston street did the shooting, or that a person had been shot. The statement was not so interwoven or connected with the principal event or transaction as to be regarded as a part of the transaction itself, and was not admissible as of the *res gestæ*.

The testimony of the witness that the man running away was the defendant, and, in connection with other evidence, that the witness found the pistol near the defendant where stopped by the other officer was material, relevant and competent. The witness might properly and competently testify to the facts which explained and described his conduct and acts in acquiring such testimony. The hearing by him of the firing of the shots at the named point, the running and crossing of Thompson street, the obstruction by the wagon of his view towards the man running towards him, the passing over West Houston street, the turning about and running upon West Houston street were such facts. In case he when running toward that street had seen the running man approach and turn upon it and had followed him he could have so testified. In case as he was approaching that street the bystander had pointed in the direction of the fleeing man and he had followed the pointed direction he could have so testified. The words called out, in fact, were of the same quality and nature, as

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evidence, as the actual hearing of the fired shots, or the seeing of the running man, or the pointed direction in the supposed cases. It is true the character of the accused testimony admits the possibility of its use for an improper purpose and to the prejudice of the defendant. If it would naturally or within reasonable contemplation have been deemed by the jury as the equivalent of the statement that the man who did the shooting ran over Houston street, or as testimony identifying him who ran as a murderer, it manifestly was hearsay and incompetent. We are very certain that the jury could not so have deemed it. The witness Harson was the People's first witness and the testimony was given at the commencement of his direct examination. Except through the opening address of the district attorney, which was brief, very general and contained no reference to the subject-matter of the testimony, the jury had not information of the circumstances and conditions of the shooting. There was no connection between the bystander calling out and the shooting. There was no fact which directly or indirectly induced the thought to the jury that the bystander was identifying a murderer. The testimony could not naturally or reasonably have expressed more to the jury than would the testimony of the witness that he saw the running man and followed him.

The evidence being competent and admissible it is immaterial that an improper ground for receiving it was stated.

The judgment of conviction should be affirmed.

HISCOCK, Ch. J., CUDDEBACK and CARDOZO, JJ., concur; CHASE and POUND, JJ., concur in result under section 542 of the Code of Criminal Procedure; ANDREWS, J., not sitting.

Judgment of conviction affirmed.

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CELIE G. TURNER, Appellant, v. THE CRYSTAL FILM
COMPANY, Respondent.

Negligence — master and servant — place to work — dangerous situation — questions of negligence for jury — erroneous dismissal of complaint.

1. Where the place in which the work was to be performed was prepared by the master and furnished by it to the servant and there was a dangerous situation, apparent if any reasonable inspection was given, in an action by the servant to recover for injury the question of defendant's negligence and of plaintiff's contributory negligence should be submitted to the jury.

2. Plaintiff, a moving picture actress, was taken to a wood by her employer and required to stand on a limb of a tree, a few feet from the ground. She was then instructed to drop to the ground and assured that "everything is perfectly safe." On striking the ground her foot came in contact with a partly covered root, resulting in a fracture. *Held*, that in an action to recover for such injury it was error to dismiss the complaint.

Turner v. Crystal Film Co., 173 App. Div. 969, reversed.

(Argued December 11, 1918; decided January 7, 1919.)

APPEAL from a judgment, entered May 31, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

John M. Gardner for appellant. It was the defendant's duty to see that the landing place, where plaintiff was requested to drop by Golden, the superintendent, was made reasonably safe. This was an absolute duty which could not be delegated. (*McGuire v. Bell Telephone Co.*, 167 N. Y. 211; *Benzing v. Steinway & Sons*, 101 N. Y. 552.) Where, as here, the master gives assurance of safety

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he and not the employee assumes the risk. (*Span v. Ely*, 8 Hun, 255.)

Stephen P. Anderton, Edward K. Hanlon and Alfred W. Melden for respondent. The evidence failed to show any negligence on the part of the defendant or Mr. Golden in preparing the ground. (*McGuire v. Bell Telephone Co.*, 167 N. Y. 208.) If there was any negligence it was that of Fish and Koch in preparing the ground; and defendant is not liable for their negligence in that detail of the work. (*Citrone v. O'Rourke Engineering Co.*, 188 N. Y. 330; *Hahn v. C. M. Opera Co.*, 126 App. Div. 815.) Mr. Golden's declarations, testified to by the plaintiff, were mere matters of opinion, and liability on defendant's part cannot be predicated thereon. (*O'Brien v. Buffalo Furnace Co.*, 183 N. Y. 317; *Pellegrino v. Smith Co.*, 176 App. Div. 930; *Scott v. D., L. & W. R. R. Co.*, 148 App. Div. 699.)

ANDREWS, J. This action was brought to recover damages for injuries caused by alleged negligence of the defendant. It resulted in a verdict for the plaintiff for the sum of \$4,000. The judgment entered upon this verdict was reversed by the Appellate Division which disapproved of the finding of the jury that the defendant was negligent and the complaint was dismissed. An appeal was then taken by the plaintiff to this court.

On the evidence the jury might have found that the plaintiff was engaged as an actress by the defendant who was making a film for a moving picture. This film was executed under the supervision of a Mr. Golden, the director and general manager of the defendant. The scene being taken was in a wood in the open country. The plaintiff was carried to the spot in an automobile. She was left in the machine while Mr. Golden and others entered the wood to prepare a place for the picture. In

half an hour they returned and told her that they were ready. She was taken to a tree on the outskirts of the wood. The scene required her to stand on a small limb of the tree a few feet from the ground grasping a higher limb with her hands. This she did and the picture was taken. Then Mr. Golden instructed her to hang from the upper limb and to drop to the ground. To these instructions, she replied, "Oh." He then said, "do not be afraid. It is all right. Everything is perfectly safe. We have tested the limb and it is only a short drop at that."

The plaintiff took the required position. Mr. Golden directed her to drop. She did so but on striking the ground her left foot came in contact with a root and the result was a serious fracture of her ankle. This root the plaintiff had not seen before the fall. Just how obvious it was is not clear. The plaintiff describes it as being from one to two inches in diameter. She says it came out from the tree sometimes below and sometimes above the surface of the ground. She says it was not covered with leaves, at least at the point where her foot struck. Later she says that her foot struck the root through the leaves but the fair inference from her whole testimony is that the root was partly covered and partly uncovered. The defendant's witnesses state that the trees of the wood were pine and that there were no leaves on the ground.

Under these circumstances, we do not think that the dismissal of the complaint was justified. There was some evidence from which negligence on the part of the defendant might be inferred. The plaintiff was required by the defendant to drop three or four feet at a point where the jury might say that the accident which actually happened should have been foreseen.

It is not such a case as are those referred to by the respondent where the progress of the work creates the

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conditions complained of. Here the place in which the work was to be performed was prepared by the defendant and furnished by it to the plaintiff. There was a dangerous situation which must have been apparent if any reasonable inspection were given. If the plaintiff is to be believed here was no concealed or latent defect but an open one. The question of the defendant's negligence and of the plaintiff's contributory negligence should be submitted to the jury.

As the Appellate Division has reversed the finding as to defendant's negligence, the judgment appealed from must be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO and POUND, JJ., concur; CUDDEBACK, J., not voting.

Judgment reversed, etc.

JOHANNA F. SWEENEY, Appellant, v. THE CITY OF NEW YORK, Respondent.

Negligence — streets and sidewalks — New York (city of) — requirement of charter that notice of intention to bring action for injuries, caused by negligence of the city, must be filed with the corporation counsel — when letters detailing accident and making claim for damages mailed to finance department and by it delivered to corporation counsel constitute sufficient notice and filing thereof.

1. When it is said in a statute that a paper must be filed with an officer the requirement is complied with when the party delivers that paper to the officer at his official place of business and there leaves it with him. Whether he does this personally or by mail is immaterial, so long as it is actually received.

2. Plaintiff was injured, as she says, by stumbling over a defective cover of a hole in the sidewalk on the side of Pacific street near the Twenty-third Regiment Armory. Plaintiff's father wrote the finance department of the city, giving the time of the accident and adding: "There is a coal or vent hole in the sidewalk over which has been

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placed a wooden cover which protrudes two or more inches above the sidewalk, one portion of which is broken off." Plaintiff's father again wrote referring to the accident, complaining of the delay, stating that if he heard nothing within a few days he would be obliged to place the matter in the hands of an attorney. Both of these letters were received by the finance department and came into the possession of the corporation counsel. Both letters were written at the plaintiff's request and on her behalf, within six months after the accident. The complaint was dismissed on the ground that the notice given was not sufficient. It is claimed that the complaint is defective in that it failed to allege that thirty days had elapsed since the demand was presented to the comptroller and that he thereafter for thirty days refused to make any adjustment of the claim. Such a statement should have been included in the complaint, but proof of both of these facts was received without objection. *Held*, that with this evidence in the case, the complaint should be deemed amended to conform to the proof. *He'd*, further, that the point of the accident was clearly and definitely indicated and the letters sufficiently stated an intention to sue the city in case the claim was not settled. Hence the complaint should not have been dismissed.

Sweeney v. City of New York, 173 App. Div. 984, reversed.

(Argued November 26, 1918; decided January 14, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 1, 1916, unanimously affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Theodore H. Lord and *Charles W. Lucas* for appellant. There was a sufficient compliance with the statutory requirements as to notice. (*Werner v. City of Rochester*, 77 Hun, 33; 149 N. Y. 563; *Beyer v. City of North Tona-wanda*, 183 N. Y. 338; *Sheehy v. City of New York*, 160 N. Y. 139; *Walden v. City of Jamestown*, 178 N. Y. 213; *Missano v. Mayor, etc.*, 160 N. Y. 123.)

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William P. Burr, Corporation Counsel (*William B. Carswell* of counsel), for respondent. The complaint is insufficient on its face. (*Casey v. City of New York*, 217 N. Y. 192; *Bernreither v. City of New York*, 123 App. Div. 291.) The alleged notices were invalid. (*Casey v. City of New York*, 217 N. Y. 192; *Weisman v. City of New York*, 219 N. Y. 178; *Purdy v. City of New York*, 193 N. Y. 521; *Tynan v. City of New York*, 223 N. Y. 596; *Walker v. City of New York*, 150 App. Div. 280; *McClorey v. City of New York*, 158 App. Div. 946; *Bannon v. City of New York*, 150 App. Div. 314; *Raubin v. Vil. of Wellsville*, 83 App. Div. 581; *Learned v. Mayor, etc.*, 21 Misc. Rep. 601; *Van Hovenberg v. City of New York*, 83 Misc. Rep. 369.)

ANDREWS, J. No action to recover damages for personal injuries sustained because of its negligence may be maintained against the city of New York unless notice of an intention to begin such action and of the time and place where the injuries were received shall have been filed with the corporation counsel within six months after the cause of action shall have accrued. (Laws of 1886, chapter 572.)

This provision should be reasonably construed. Its purpose is to protect the city against unfounded claims by enabling its law officers to investigate promptly the circumstances surrounding the alleged accident and the place where it is said to have occurred. It is not a trap to catch the unwary or the ignorant.

On March 15th, 1913, the plaintiff was injured. She says she stumbled over a defective cover of a hole in the sidewalk on the side of Pacific street near the Twenty-third Regiment Armory. On March 18th her father mailed a letter to the finance department of the city,

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giving the time of the accident and adding: "There is a coal or vent hole in the sidewalk over which has been placed a wooden cover which protrudes two or more inches above the sidewalk, one portion of which is broken off." This letter was received, and on March 27th came into the possession of the corporation counsel. Thereafter, an investigator from his department interviewed the plaintiff as to the accident. On June 18th the finance department received a second letter from the plaintiff's father again referring to the accident, complaining of the delay and stating that if he heard nothing within a few days, he would be obliged to place the matter in the hands of an attorney. On the 20th this letter was sent to the corporation counsel. Both letters were written at the plaintiff's request and on her behalf.

The complaint was dismissed on the ground that the notice given was not sufficient. No other question was raised or considered by the trial court. It is now said that the complaint is defective in that it failed to allege that thirty days have elapsed since the demand was presented to the comptroller and that he thereafter for thirty days refused to make any adjustment of the claim. (Greater New York Charter [L. 1901, ch. 466], section 261.) It is quite true that such a statement should have been included in the complaint. (*Casey v. City of New York*, 217 N. Y. 192.) But proof was received without objection that at least as early as March 19th the comptroller received a letter which was and which he treated as a claim and that on July 25th this claim was rejected by him. With this evidence in the case, the complaint should be deemed amended to conform to the proof.

The important questions for our consideration, therefore, are whether the two letters can be considered a notice within the meaning of the act of 1886. Were they filed with the corporation counsel? Do they adequately

state the place of the injury and an intention to begin an action? All these questions we answer in the affirmative.

"Notice" is to be given of certain facts and purposes. It must be more than an oral notice for it is to be filed, but its form is not specified nor is any signature or oath required. It may be drawn by the ignorant or the illiterate, but the information required is to be communicated in writing to the corporation counsel. He is to be told of the accident, of its time and place and that the person injured intends to sue the city.

If such information so comes to him, the object of the statute is attained. Whether in one paper or two is immaterial. In either event, he has before him in writing the knowledge which the legislature intended that he should have so that he may properly protect the city.

The verb "to file" may be used in various senses. When as in this statute it is said that a paper must be filed with an officer the requirement is at least complied with when the party delivers that paper to the officer at his official place of business and there leaves it with him. Whether he does this personally or by mail is, we think, immaterial, so long as it is actually received. In *Gates v. State of New York* (128 N. Y. 221) a notice was mailed but there was no proof that it was received by the board to which it was addressed. The notice may be left by an agent. Finally, in construing this same statute, we held in *Missano v. Mayor, etc., of N. Y.* (160 N. Y. 123) that it is enough if the corporation counsel actually and seasonably receives the notice from another official to whom it may have been mistakenly delivered. It is true we there speak of his having received and filed the notice. We speak of his examination of the plaintiff. Both remarks were appropriate in the case cited. And in any case similar evidence is competent for the paper or papers received by the corporation counsel must be in such form that he knows or should know that they

contain the information he is entitled to have, and where he acts upon it, it shows to some extent that the paper was not intended for nor taken as a mere bit of casual news. In the *Missano* case the notice was actually filed by the comptroller. That fact was not material to the result. The rule we adopt is that if a paper of the character required comes into his possession within the time limited by the statute, it is unimportant how the possession is acquired. The object of the statute is accomplished.

We think the place of the accident was sufficiently indicated. The rule as to this matter is clear. As we said in *Purdy v. City of New York* (193 N. Y. 521) all that the statute requires is such a statement as will enable the authorities to locate the place of the accident. No particular form of words is required. Measurements need not necessarily be given. Any description adequate for the purpose is enough.

It is when we come to apply this rule to particular instances that difficulty arises. Every case is a law to itself. A broken culvert would be one thing; one hole in a pavement among many another. Does the notice, whatever it is, fairly indicate to the authorities the place of the accident so that they may readily find it and make proper investigation?

A review of some recent cases in this court shows the narrow line between the good and the bad. In *Purdy v. City of New York* (193 N. Y. 521) Milford street was a mile long. The notice spoke of the opening, gully or trench running across the sidewalk. Which sidewalk was not stated. We thought that under the circumstances the authorities might have been misled. This case is on the border line and in holding the notice defective we went as far as we are disposed to go. In *Casey v. City of New York* (217 N. Y. 192) the notice spoke of "a hole in the pavement on the public highway at or about Washington Street near Vestry Street." As

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we pointed out this was most indefinite. The place indicated might not even be in Washington street. The notice did not state on which side of Vestry street it was. No one could locate the place with accuracy. In *Weisman v. City of New York* (219 N. Y. 178) the plaintiff gave the date of accident as eight days too early. We held that this made the notice invalid. In *Tynan v. City of New York* (223 N. Y. 596) the notice gave the place of accident as the northeast corner of Flushing avenue and Garden street and complained of the condition of crosswalk, pavement or sidewalk. Here again we thought the notice too indefinite. Many defects might exist in that locality, any one of which might have caused the accident. It was because the particular one complained of could not be identified that we held the notice insufficient. On the other hand in *Werner v. City of Rochester* (149 N. Y. 563) the notice spoke of a large pile of dirt in the middle of the street about one-third of a mile east of a railroad track. That notice we held good. We thought that as the defect was obvious it sufficiently indicated the place where the accident was said to have occurred.

In the case at bar the street was given, the sidewalk, the approximate location upon it of the accident, the nature of the obstruction and a detailed description of it which could hardly have been mistaken. The attention of the city authorities was clearly called to precisely what was complained of. The point of the accident was definitely indicated.

The two letters also sufficiently stated an intention to sue the city in case the claim was not settled. (*Sheehy v. City of New York*, 160 N. Y. 139.) The first describes the accident, states that it is written so the city may investigate, and asks that the matter be given attention. The second complains of delay, said the matter had been investigated and states that unless the writer hears

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from the comptroller promptly he will be compelled to place it in the hands of an attorney. This seems to us to be fairly a notification that a suit would be begun.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

McLAUGHLIN, J. (dissenting). Action to recover damages for a personal injury sustained by stepping into a hole in one of the streets of the city of New York. Plaintiff was nonsuited at the trial on the ground that the notice served was insufficient under the statute. Judgment to this effect was entered, which was unanimously affirmed by the Appellate Division. Leave was given to appeal to this court.

I am unable to concur in the decision about to be made reversing the judgment appealed from and granting a new trial.

The statute (Laws of 1886, chap. 572) provides that an action to recover damages against any city of the state having a population of 50,000 or over, on the ground of negligence, cannot be maintained "unless notice of the intention to commence such action and of the time and place at which the injuries were received shall have been filed with the counsel to the corporation or other proper law officer thereof within six months after such cause of action shall have accrued."

Section 261 of the Greater New York charter provides: "No action * * * shall be prosecuted or maintained against the City of New York, unless it shall appear by and as an allegation in the complaint * * * that at least thirty days have elapsed since the demand, claim or claims upon which such action * * * is founded were presented to the comptroller of said city for adjustment, and that he has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment * * *."

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The plaintiff was injured on the 15th of March. On the 18th of March her father, acting for her, mailed a letter addressed to the "Finance Department" of the city, stating:

"I wish to notify you of a serious accident to my daughter, Johanna F. Sweeney, which happened Saturday evening, March 15th, on Pacific Street, near Bedford Avenue, Brooklyn.

"On the side of Pacific Street near the 23rd Regiment Armory there is a coal or vent hole in the sidewalk, over which has been placed a wooden cover, which protrudes two or more inches above the sidewalk, one portion of which is broken off, and while walking along she struck her foot against said cover and has either broken or sprained her ankle very badly. * * *

"Trusting you will give this matter the necessary attention."

On the 20th of March the deputy comptroller acknowledged receipt of the letter and stated that the communication had been entered as a claim and "referred to the Division of Claims of this Department for investigation." On the 17th of June following, plaintiff's father mailed another letter, addressed to the "Finance Department," in which, after referring to the letter of the 18th of March, he said: "I feel that this matter has gone long enough without some attention being paid to it on your part and I trust you will give the matter immediate attention. I have tried to place this matter before you in a business way, feeling that you would treat it the same, and evidently it is being passed up with very little attention being given it. I hope to hear from you within the next few days; otherwise I will be compelled to place the matter in the hands of an attorney."

The receipt of this letter was acknowledged by the deputy comptroller and plaintiff's father informed that the claim had been referred to the corporation counsel

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for an opinion as to the liability of the city. Both of the letters from plaintiff's father were sent by the comptroller to the corporation counsel for the purpose of obtaining his opinion as to whether the city were liable. The corporation counsel advised the comptroller that the city was not liable and the comptroller thereupon so informed plaintiff's father. This action then followed.

The only allegation in the complaint as to filing notice of the claim or of an intention to sue is found in paragraph eleven, which reads as follows: "That immediately after said accident occurred and on the 18th of March, 1913, the plaintiff caused to be filed a notice with the Comptroller of the City of New York of her intention to commence this action, and of the time when and place where her damages were incurred or sustained. That said Comptroller, within six months after the happening of said accident, caused said notice of plaintiff's intention to commence such action served on him as aforesaid, to be transmitted to the Corporation Counsel of the City of New York, and said notice was actually acted upon by said Corporation Counsel and the said Corporation Counsel investigated said accident and reported thereon. That neither the Comptroller of the said City, nor the Corporation Counsel of the said City, have made any adjustment or settlement of said claim."

When the action came on for trial the learned trial justice, no motion or request having been made by either party, said: "On looking over the papers I shall have to dismiss the complaint on the ground that the notice is insufficient and that the city is not liable. If you wish testimony you may put in just what is necessary for the purpose of reviewing the question. The notice will be put in, of course." Thereupon the counsel agreed if the case could be postponed for two days the facts could be agreed upon. This was done and the statement of facts set forth in the record agreed upon.

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There are three reasons which, as it seems to me, prevent a recovery by plaintiff: (1) The notice required by the statute was not filed; (2) no notice was ever filed by plaintiff, or any one acting for or on her behalf, with the corporation counsel; and (3) the complaint does not state a cause of action.

First. The letter of March 18th, which is the one alleged in the complaint to constitute a notice, is not such notice as the statute requires. That letter does not contain a word indicating an intention to sue, which is a prerequisite to the maintenance of an action of this character. The letter of June 17th recognized this fact; otherwise there is no meaning to the statement, "I have tried to place this matter before you in a business way, feeling that you would treat it the same." Nor do I think the letter of June 17th contained a statement, if the claim were not paid, of an intention to sue. It is true the statement is therein made that plaintiff would be compelled to place the matter in the hands of an attorney, but this was not equivalent to a statement that unless the claim were paid an action would follow. Claims are usually, in the first instance, placed in the hands of an attorney for the purpose of obtaining his advice as to whether an action should be commenced. The notice which the statute here requires is one from which it can be seen that unless the claim is adjusted an action will be brought. Neither of these letters, nor both of them taken together, constitute such statement. Not only this, but I do not think that the notice required can be made up of a series of letters mailed to the finance department of the city. The notice contemplated by the statute must consist of a definite statement in writing, filed, not in the finance department, but with the corporation counsel. Filing the claim with the proper official goes to the jurisdiction and the right to any recovery whatever. The right of a party to recover for personal injuries of the

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character of the one under consideration is given by the statute and the conditions therein provided as to procedure must be strictly complied with. The words used are not obscure. The action cannot be maintained unless the notice "shall have been filed with the counsel to the corporation." To constitute a filing there must have been a delivery by or on behalf of the party making the claim at the office of the corporation counsel. This court, in principle, so held in *Gates v. State* (128 N. Y. 221). The statute having prescribed the procedure, a party must bring himself strictly within the terms laid down. This seems to have been the view of this court, as indicated in recent decisions. (*Tynan v. City of New York*, 223 N. Y. 596; *Weisman v. City of New York*, 219 id. 178; *Casey v. City of New York*, 217 id. 192; *Purdy v. City of New York*, 193 id. 521.)

Second. The plaintiff never intended to and never did file a notice with the corporation counsel. The letters were addressed to the finance department. But it is said that because the comptroller submitted these letters to the corporation counsel for his opinion as to the liability of the city, that that constituted a "filing" as required by the statute. The corporation counsel is the legal adviser of the comptroller. The latter not only has the right, but it is his duty if in doubt as to the validity of a claim, to go to the corporation counsel for advice. That is all the comptroller here did. When he sent the letters to the corporation counsel he was acting, not for the plaintiff, or on her behalf, but solely for the city. To hold that this constituted a filing within the terms of the statute is to destroy its beneficial effect.

Third. The complaint does not state a cause of action. There is no allegation in it to the effect that the notice required by the statute had been filed with the corporation counsel by the plaintiff or that at least thirty days had elapsed since the claim was presented to the comp-

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troller for adjustment and that he had "neglected or refused to make any adjustment or payment." The allegation of the complaint is that notice was filed with the comptroller and he transmitted it to the corporation counsel. The notice, as I have already indicated, must be filed by the plaintiff or by some one acting on her behalf. This notice, if it be assumed that the two letters constituted one, was never transmitted to the corporation counsel for the plaintiff. The comptroller was not acting for her nor could he or the corporation counsel, in my opinion, waive the provisions of the statute. (*Buckles v. State of New York*, 221 N. Y. 418.)

The complaint is also defective in that it does not comply with the section of the charter before quoted. There is no allegation in the complaint that the comptroller "*has neglected or refused to make any adjustment or payment.*" The allegation is: "That neither the Comptroller of the said city nor the Corporation Counsel of the said city have made any adjustment or settlement." The words "adjustment or settlement" are not equivalent to an allegation that the comptroller "*has neglected or refused to make any adjustment or payment.*" This is precisely what this court held in *Casey v. City of New York* (*supra*). But it is said the pleadings may be conformed to the proof and thereby make a good complaint out of a bad one. There is no proof in the record, as I read it, bearing on the subject. The facts were stipulated for one purpose and one purpose only, viz., to have the record present the one question which induced the trial court to dismiss the complaint.

Entertaining these views, I vote to affirm the judgment appealed from.

CHASE, HOGAN and CARDOZO, JJ., concur with ANDREWS, J.; McLAUGHLIN, J., dissents in opinion; HISCOCK, Ch. J., and POUND, J., concur with McLAUGHLIN, J., the former on second ground stated in opinion.

Judgment reversed, etc.

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ERNESTINE NOAH, Appellant, v. THE BOWERY SAVINGS
BANK, Respondent.

Evidence — savings banks — action to recover deposits paid to third party wrongfully in possession of depositor's bank book — care and diligence required of bank to ascertain that person receiving money is entitled thereto — burden of proof upon bank — opinion evidence — when improperly admitted.

1. While it is no longer a valid objection to the expression of an opinion by a witness that it is upon the precise question which the jury are to determine, evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable it to form an accurate judgment thereon, and no better evidence than such opinions is attainable, but where the jury can form a proper conclusion after facts known only to experts have been disclosed it is its province to draw the conclusion.

2. A savings bank cannot rely in making payment solely upon the possession and presentation of the bank book of the depositor, but must exercise ordinary care and diligence to ascertain that the person receiving the money is entitled thereto. The burden is upon the bank to prove this defense and a charge to the jury that the plaintiff must prove by a preponderance of evidence that the bank failed to exercise the ordinary care which it was required to under the circumstances of the case is erroneous.

3. A witness who had qualified as an expert was asked "whether or not, in your opinion, if a depositor opens an account in her name as 'Ernestine' somebody or other, and a draft is presented signed 'Ernestina' somebody or other, purporting to come from her, that circumstance would tend to excite suspicion in the mind of the ordinarily competent signature clerk?" Over objection and exception the witness answered: "In my opinion it would not excite any suspicion." *Held*, error; that it was for the jury to say whether the clerks of the bank exercised care and whether, if reasonably prudent, they should have been suspicious.

4. Questions to the effect whether it would excite suspicion in the mind of an ordinarily competent test clerk that several withdrawals were made within a short period on an account on which there had been no previous withdrawals or where the whole of an account was withdrawn under like conditions were improperly allowed.

Noah v. Bowery Savings Bank, 171 App. Div. 912, reversed.

(Argued December 3, 1918; decided January 14, 1919.)

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Points of counsel.

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 24, 1915, affirming a judgment in favor of defendant entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Harold Nathan and *Mortimer Brenner* for appellant. The trial court erred in charging that the burden of proving defendant's negligence was upon the plaintiff and in refusing to charge that there was no burden on the plaintiff to prove the defendant's negligence. (*Dowling v. Hasting*, 211 N. Y. 199; *Lerche v. Brasher*, 104 N. Y. 157; *Keteltas v. Myers*, 19 N. Y. 231; *Posner v. Rosenberg*, 149 App. Div. 272; *Allen v. W. S. Bank*, 69 N. Y. 314; *Gearns v. B. S. Bank*, 135 N. Y. 557; *Kummel v. G. S. Bank*, 127 N. Y. 488; *Mahon v. S. B. S. Inst.*, 175 N. Y. 69; *Kelley v. B. S. Bank*, 180 N. Y. 171; *Israel v. B. S. Bank*, 9 Daly, 507.) The court erred in refusing to charge that the plaintiff was not bound to show freedom from negligence and in permitting the introduction of testimony for the purpose of establishing negligence on the part of the plaintiff. (*Mahon v. S. B. S. Inst.*, 175 N. Y. 69; *Campbell v. S. S. Bank*, 114 App. Div. 337; *Ladd v. A. S. Bank*, 96 Me. 510; *Chase v. W. S. Bank*, 77 Conn. 295; *Brown v. M. R. S. Bank*, 67 N. H. 549; *N. I. & S. Co. v. W. & R. Co.*, 62 N. H. 163.) The court erroneously permitted defendant's expert witnesses to testify to the degree of competency and care exercised by the defendant and erroneously refused to permit plaintiff's experts to testify on the same questions. (*Bogart v. City of New York*, 200 N. Y. 379; *Ferguson v. Hubbell*, 97 N. Y. 507; *McCarragher v. Rogers*, 120 N. Y. 526; *Harley v. Buffalo Car Manufacturing Co.*, 142 N. Y. 31; *Dittman v. Edison E. L. Co.*, 144 App. Div. 632; *Dolan v. Herring-Hall-Marvin Safe Co.*, 105 App.

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Div. 366; *Winters v. Naughton*, 91 App. Div. 80; *Cramer v. Slade*, 66 App. Div. 59; *Stoothoff v. Bklyn. H. R. R. Co.*, 50 App. Div. 585; *Green v. Hornellsville R. R. Co.*, 24 App. Div. 434.)

George Coggill for respondent. The trial court did not err in charging that the burden of proving defendant's negligence was upon plaintiff and in refusing plaintiff's request to charge that there was no burden on plaintiff to prove defendant's negligence. (*Hankowska v. B. S. Bank*, 155 App. Div. 694; *Israel v. B. S. Bank*, 9 Daly, 507.) The trial court should have directed a verdict for the defendant on the ground that the evidence established conclusively that it exercised due care in paying the drafts in question. The plaintiff was not entitled to have submitted to the jury the question of the defendant's negligence and was, therefore, not prejudiced by any charge on that issue made by the trial judge, even though it were erroneous. (*McKenna v. B. S. Bank*, 93 Misc. Rep. 135.) The rulings of the trial court in regard to expert testimony were correct. (*Finn v. Cassidy*, 165 N. Y. 584; *Thompson v. Jenks*, 179 N. Y. 20; *G. A. Ins. Co. v. N. Y. G. & El. Co.*, 103 App. Div. 310; *Wolfe v. Mosler Safe Co.*, 139 App. Div. 848; *Kelly v. B. S. Bank*, 180 N. Y. 171; *Campbell v. S. S. Bank*, 114 App. Div. 337.)

CRANE, J. On the 3d day of September, 1912, Ernestine Noah had to her credit in the Bowery Savings Bank the sum of two thousand three hundred sixty-four dollars and twenty-six cents (\$2,364.26). The passbook issued to the plaintiff showing this amount on deposit had printed upon it the following rule:

" 13. Should any depositor lose his book, he is required to give immediate notice thereof to the Bank. Books must be presented to be written up before interest can

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be drawn. All payments made to persons producing deposit books shall be deemed good and valid payments to depositors respectively."

The plaintiff's son, Sidney Noah, stole his mother's bank book and by forged orders drew out of this account two thousand dollars (\$2,000) which he spent on himself. On September 3d, 1912, he presented to the bank the pass book and an order purporting to be signed by the plaintiff directing the bank to pay to Sidney Noah, or bearer, the sum of three hundred dollars (\$300). On the 16th day of September, 1912, he again presented the bank book and another order, purporting to be signed by the plaintiff, directing the bank to pay to Sidney Noah or bearer the sum of five hundred dollars (\$500), and on the 4th day of October, 1912, the order, presented with the bank book and apparently signed by the plaintiff, directed the bank to pay to Sidney Nichols, or bearer, the sum of one thousand two hundred dollars (\$1,200). After certain questions were asked by the teller of Sidney Noah and the signature on the orders compared with the genuine signature in the possession of the bank; the money was paid to the son and wrongfully used by him.

Ernestine Noah claims that she never authorized these withdrawals, that her name was forged and that she never received the money. Sidney Noah was indicted for forgery, pleaded guilty and was sent to Elmira.

The bank having refused to pay these moneys to the plaintiff on demand, she has brought this action.

In her complaint she alleges the amount on deposit as above stated, her demand for the payment of two thousand dollars (\$2,000) and the refusal of the defendant to pay it. The defendant by answer admits the deposit, the demand and its refusal to pay, and sets up the payments to Sidney Noah as a separate and complete defense. It may be doubtful whether the allegations of due care and diligence are sufficient as the defendant merely states

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that Sidney Noah made correct answers to the questions asked of the depositor when the deposit was made and that the defendant exercised due diligence in examining the signature of said depositor. There is no rule of law, that I know of, which makes the asking of such specific questions and the examination of the signature a complete defense as a matter of law in all cases. Circumstances might require other things to be done to establish care and diligence. The defendant instead of pleading that it took care to do a specific thing should have pleaded that it did all things that a reasonably prudent person would have done under the circumstances and conditions presented. However, no question has been raised as to the pleadings and the trial proceeded upon the theory that the defendant in making payments to Sidney Noah was bound to exercise reasonable care.

The rule is well established that the bank cannot rely in making payment solely upon the possession and presentation of the bank book as stated in rule 13 above quoted, but must exercise ordinary care and diligence to ascertain that the person receiving the money is entitled to it. (*Kelley v. Buffalo Savings Bank*, 180 N. Y. 171.)

On the trial the judge satisfactorily charged this rule of law, making it quite clear and plain, but fell into error in charging that "the plaintiff has the burden of proof and must prove to your satisfaction by a preponderance of evidence that the bank failed to exercise the ordinary care which they were required to exercise under the circumstances of this case."

The action was for money which the defendant owed to the plaintiff. The debt was admitted. The defense was payment to a third party under such circumstances of care and diligence as to relieve the bank from liability. The burden, therefore, was upon the bank to prove this defense, and that it exercised due care and diligence in making payment to Sidney Noah. Payment in a case

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like this is an affirmative defense to be proved by the party alleging it. (*Conkling v. Weatherwax*, 181 N. Y. 258; *Dowling v. Hastings*, 211 N. Y. 199; *Lerche v. Brasher*, 104 N. Y. 157.)

There is no fact in this action which should make it an exception to this general rule.

The authorities involving the question of payment by savings banks also indicate that the burden of proving care and diligence is upon the defendant pleading it. In *Gearns v. Bowery Savings Bank* (135 N. Y. 557, 562) it was said: "It is well settled, however, that payment made to a person who is not in fact entitled to draw the deposit, though he may have possession of the book and present it at the time of payment, will not discharge the bank, unless it exercised at least ordinary care and diligence in paying the money to the wrong person." (See, also, *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314; *Kummel v. Germania Savings Bank*, 127 N. Y. 488; *Mahon v. South Brooklyn Savings Institution*, 175 N. Y. 69, 72.) In the latter case the opinion contains this statement of the rule: "When through a depositor's carelessness his bank book gets into the hands of a third person who presents it to the bank, the latter may show its care and diligence in making payment to the person presenting the pass book, and thus protect itself against a second demand for payment by the careless depositor."

How a jury may be impressed by the charge of a court as to the burden of proof of course no one knows except the jurors themselves. Upon whom rests the burden of proving a fact cannot be said to be immaterial and frequently is of great moment. The only practical course to follow is to state clearly to a jury the law as it is. The error in this particular requires a new trial.

There was also evidence admitted in this case which we think improper as bearing upon the question of the paying teller's neglect. One William E. Knox, the

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comptroller of the Bowery Savings Bank, was made an expert witness as to the mental action of bank clerks. The depositor's name was Ernestine, the order as presented by her son was signed Ernestina. After qualifying through an experience of years at the signature window and the examination of hundreds of names daily, the witness was asked this question:

"Now I ask you to tell us whether or not, in your opinion, if a depositor opens an account in her name as 'Ernestine' somebody or other, and a draft is presented signed 'Ernestina' somebody or other, purporting to come from her, that that circumstance would tend to excite suspicion in the mind of the ordinarily competent signature clerk?"

Over objection and exception the witness answered: "In my opinion it would not excite any suspicion."

It will be noted that this witness is not asked as an expert familiar with the banking business to give the usual and ordinary methods employed in the savings bank business in dealing with signatures and identification, but is asked his opinion regarding the mental operation of another; he is called upon to state what in his judgment would be the effect upon the mind of an ordinary bank clerk if the last letter of a name were wrong, and whether or not this circumstance would excite suspicion. This is carrying the rule of expert testimony too far. No authority can be found justifying such evidence. It was for the jury to say whether the clerks of the bank exercised care and whether if reasonably prudent they should have been suspicious. No expert could answer this question for them. Neither could he take up the evidence piece by piece and say just where suspicion would or should begin.

This expert familiar with the savings bank business could have stated the usual and customary method of dealing with signatures and the withdrawal of bank

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deposits. The manner in which signatures were examined and the questions which were usually asked of persons other than the depositor presenting money orders could have been testified to. Also I take it the expert could have described the appearance of many signatures, for instance that it was not unusual for names to be signed by a mark or else improperly spelled or as in this instance the last letter of the name unlike the last letter in the genuine signature. Then he could have stated the practice of banks in such cases and the things done by the clerks to make reasonably sure that the withdrawal was authorized or else that in such cases nothing was done. All these facts could have been laid before the jury and it could then have drawn the conclusion whether the employees were careful or negligent. It was not for the expert to state his opinion on the given fact that the employee was careful or, what amounts to the same thing, that he had no cause for suspicion.

Evidence was offered through other witnesses to show the frequent differences in the spelling of the first name of depositors. The "t" of a name was sometimes crossed and other times not. An "i" was sometimes dotted and other times not. There was a difference frequently in the making of the letter "r" and of the letter "e" and of the letter "h." The letter "d" was sometimes opened and sometimes closed. All of such differences appeared many times a day. The evidence does not disclose, however, what was customarily done in such cases although it is fair to presume that the signatures were honored as genuine. Considering these differences and the practice of the bank in disregarding them without their ever being questioned the jury might well say that no suspicion would arise in the mind of a careful paying teller by reason of the spelling of the name Ernestine in this case. There was no occasion, however, for an expert to draw this conclusion for them.

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While the rule as to expert testimony has been frequently stated and is well understood yet its application is sometimes difficult because of varying facts and circumstances. No such difficulty, however, arises here. The authorities agree that where the jury can form a proper conclusion after facts known only to experts have been disclosed it is the jury's province to draw the conclusion. (*Dougherty v. Milliken*, 163 N. Y. 527; *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424, 429.) This latter case contains a statement of the rule quoted in many of the cases.

"While it is no longer a valid objection to the expression of an opinion by a witness, that it is upon the precise question which the jury are to determine (*Transportation Line v. Hope*, 95 U. S. 297; *Bellinger v. N. Y. C. R. R.*, 23 N. Y. 42; *Cornish v. Farm B. F. Ins. Co.*, 74 id. 295), evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable. (*Ferguson v. Hubbell*, 97 N. Y. 507; *Schwander v. Birge*, 46 Hun, 66; Greenl. on Ev. vol. 1, section 440 and note.)" (See, also, *McCarragher v. Rogers*, 120 N. Y. 526; *Schutz v. Union Railway Company of New York City*, 181 N. Y. 33; *People v. Underhill*, 142 N. Y. 38.)

The methods and procedure of banks in dealing with questioned money orders could have been easily explained to the jury so as to enable them to determine for themselves the question of reasonable care and diligence. Lack of suspicion cannot always be the determinative factor in paying out a depositor's money. Reasonable care might demand a suspicion where from habitual indifference none in fact existed.

What we have here stated also applies to these questions asked of the assistant paying teller:

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" Q. Mr. Robertson, in your opinion would it excite any suspicion in the mind of an ordinarily competent test clerk that three or four withdrawals were made within one month on an account upon which there had been no previous withdrawals for some time? * * *

Q. In your opinion would it excite any suspicion in the mind of an ordinarily competent test clerk that the whole of an account were withdrawn after there had been no withdrawals for some time? "

The objections to these questions should have been sustained.

As there is to be a new trial of this case it may be well to call attention to another ruling which was erroneous. The plaintiff called the paying teller of the Coal and Iron National Bank and asked him a question as an expert similar to that asked by the defendant of its experts as above given and which was equally objectionable. Being incompetent, as we have stated, the court could properly have excluded it. The ruling made, however, was as follows:

" The Court holds that the witness has qualified as an expert on handwriting, but has not qualified as an expert as to the degree of care that should be exercised by a teller in a savings bank."

If this meant that officials from banks of deposit qualified as experts could not give the usual and customary methods used in such banks for comparing signatures or detecting forgeries we think this a too narrow limitation. The custom which is followed in all the banks in the city of New York — deposit or savings — could properly be shown in order to determine the care used in this instance.

It follows from what is here stated that the judgment appealed from must be reversed and a new trial granted.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK and HOGAN, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment reversed, etc.

WALTER MICHALSKI, Respondent, *v.* AMERICAN MACHINE
AND FOUNDRY COMPANY, Appellant.

Labor Law — provision requiring machines used in factories to be guarded — construction and application of such provision — employer not liable for injury from unguarded machine if there is no practicable guard obtainable — evidence examined and held insufficient to sustain verdict against employer.

1. The statute (Labor Law, § 81, subd. 1) requiring machinery and machines used in a factory to be guarded has application only to machines and machinery which it is practicable to guard and from which, unguarded, injuries to employees may reasonably be apprehended. In order to hold an employer liable for failure to comply with the statute, there must have been a practicable guard which could have been acquired by him.

2. Where in an action to recover for injuries suffered by plaintiff, it was claimed that the machine by which they were inflicted was not properly guarded, and it appeared that there was not in the market or procurable or contrivable by defendant any guard for the machine, the testimony of a witness descriptive of a guard which never had existed or been obtainable or known to or contrivable by the defendant, raised no real conflict in the evidence and could not be adopted by the jury as the basis of a verdict for plaintiff.

Michalski v. American Machine & Foundry Co., 176 App. Div. 901, reversed.

(Argued December 6, 1918; decided January 14, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered October 9, 1916, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

J. Arthur Hilton for appellant. The defendant did everything that a reasonably careful and prudent man could have done under the circumstances and is, there-

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fore, not liable for the plaintiff's injury. (*Bushtis v. C. C. Co.*, 128 App. Div. 780; 198 N. Y. 548; *West v. B. M. Co.*, 128 N. W. Rep. 992.)

Adolph Ruger for respondent. Appellant was guilty of negligence in that it violated the provisions of the Labor Law (Cons. Laws, ch. 36, § 81). (*Scott v. I. P. Co.*, 204 N. Y. 49; *Derouin v. N. Y. A. B. Co.*, 222 N. Y. 627; *Martin v. Walker-Williams Mfg. Co.*, 198 N. Y. 324; *Basel v. Ansonia Clock Co.*, 159 App. Div. 912; *McEwen v. Borden's Condensed Milk Co.*, 154 App. Div. 185; *Michalski v. American Machine & Foundry Co.*, 169 App. Div. 967.)

COLLIN, J. The action is, servant against master, to recover damages for the alleged negligence of the defendant in failing to comply with a statute in that it did not guard the cutter of a milling machine. The Appellate Division by a decision not unanimous affirmed the judgment consequent upon the verdict of the jury in favor of the plaintiff. If there was not evidence that tended to support the verdict, the denial of the defendant's motion that the complaint be dismissed and the submission of the case to the jury were errors. (*Heskell v. Auburn L., H. & P. Co.*, 209 N. Y. 86.) We are to determine under the record presented, as a question of law, whether or not the evidence presented an issue of fact; in reviewing it we must give the respondent the advantage of all the facts properly presented and every favorable inference that can reasonably be drawn.

The plaintiff was injured by thrusting, as he slipped upon the oily floor, his hand upon the unguarded cutter of the milling machine which he was operating as an employee in the factory of the defendant. The machine, including the part designated the cutter, was described upon the trial. Its function was to shave, with exceeding

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exactness, at times within less than a hair's breadth, the rough or irregular surface of metal. The cutter was a steel solid wheel, in upright position above the table of the machine, about seven inches in diameter and one inch in width. In and across the width of its circumference were set teeth or knives which, as it was revolved at the speed of about one hundred revolutions each minute, did the shaving.

At the trial the plaintiff expressly alleged, as the sole act of negligence on the part of defendant, its failure to comply with the statute. The trial justice charged the jury that whether the defendant was negligent depended upon whether it was practicable to guard the cutter. The appellant asserts and argues that conflicting evidence established that it was not practicable. The statute relates to a factory where machinery is used, and provided: "Machinery of every description shall be properly guarded and provided with proper safety appliances or devices. All machines, machinery, apparatus, furniture and fixtures shall be so placed and guarded in relation to one another as to be safe for all persons." (Labor Law [Cons. Laws, chapter 31], section 81, subdivision 1.) In applying an analogous statute it has been stated that there is a broad distinction between "machines" and "machinery;" a machine is a concrete thing, consisting of all the parts and devices necessary to its operation; machinery is only a part of a machine, designed to work with other parts, so as to effect the common end. (*National Enameling & Stamping Co. v. Zirkovics*, 251 Fed. Rep. 184.) The statute has application only to machines and machinery which it is practicable to guard and from which, unguarded, injuries to employees may reasonably be apprehended. (*Scott v. International Paper Co.*, 204 N. Y. 49; *Pyne v. Cazenovia Canning Co.*, 220 N. Y. 126; *Glens Falls Portland Cement Co. v. Travelers Insurance Co.*, 162 N. Y. 399.)

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A detailed narration of the evidence is not essential to an understanding of the reasons for our decision. The plaintiff, in proving his case, as a witness in his behalf, testified that the cutter was guarded by parts of the milling machine at either side and above, and was unguarded only at its front and rear; it was necessary for the operator to watch the circumference of the cutter and its contact with the metal when work was being performed, otherwise the machine would have to be stopped to know whether or not the work was being correctly done. He introduced no other material evidence (apart from photographs of the machine) relating to the cutter and its guarding. The evidence of the defendant, several of whose witnesses were disinterested, established the conclusions: the defendant had through the four or five years last past attempted to find and to contrive a guard for the cutter; it was unable to learn of or find one in the markets, or to contrive one which would not seriously affect its efficiency or utility; it was impossible to guard the cutter and leave it capable of performing the varied operations required of it; there was no guard for the cutter in the markets or obtainable; no instance of the guarding of or no guard for a cutter like unto this was known or heard of. The evidence in behalf of the defendant did not permit a reasonable inference conflicting with those conclusions. A witness called by the plaintiff, in rebuttal, testified in effect: he was and for twenty-five years had been a consulting engineer; he had examined the milling machine in question to see if it was practicable to put a guard on it; it is practicable to guard, in the way described by him, the cutter of this machine while cutting a piece of material such as was then shown him; he had seen probably twenty-five thousand milling machines and never saw but one guarded; that he saw in operation about three years prior and saw it again about six months prior

to the then time. The plaintiff produced no further evidence relating to the practicability of guarding the cutter.

Such evidence in behalf of the plaintiff did not conflict with that introduced by the defendant to which we have referred. In order that there may have been a practicable guard there must have been a guard acquirable by the defendant, and workable. The statute does not require of the owner of a factory unreasonable results, omniscience, or unusual and extraordinary inventive genius. The evidence of the defendant proved that there was not in the market, or procurable or contrivable by it, any guard for the cutter; diligently it had sought, without success, to acquire a guard. This evidence, if undisputed directly or inferentially, did not permit a finding that the defendant was negligent. It was so undisputed. Indeed, a reasonable inference strengthening it is created by the evidence for the plaintiff. His expert witness, through many years of experience and investigation, during which the statute invoked by the plaintiff was, in effect, existing, had seen only one of twenty-five thousand milling machines guarded. Assuredly, the inference was reasonable that the guarding of the cutter up to the time of the trial had been deemed, by the parties interested, infeasible. The testimony of the witness, descriptive of a protecting guard which never had existed or been obtainable or known to or contrivable by the defendant, raised no real conflict and could not be adopted by the jury.

The judgment should be reversed and a new trial granted, costs to abide the event.

HISCOCK, Ch. J., CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ., concur; CHASE, J., dissents.

Judgment reversed, etc.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* MARQUIS CURTIS, Appellant, *v.* HARRY R. KIDNEY as Agent and Warden of AUBURN PRISON, Respondent.

Habeas corpus — constitutional law — special proceedings — writ to inquire into the detention of one imprisoned, or held in custody, for a crime, is a civil, not a criminal, process, a special proceeding to enforce a civil right — appeal from order dismissing a writ not appealable as involving a constitutional question.

1. A writ of habeas corpus to inquire into the detention of one confined in a prison under conviction and sentence is a civil, not a criminal, proceeding, classified by the Code of Civil Procedure as a state writ (§ 1991) and as a civil special proceeding (§§ 3333–3337, 3343, subd. 20) to enforce a civil right, although its purpose is to effect the release of the person from imprisonment or custody under a criminal prosecution.

2. Where an order of a County Court dismissing a writ of habeas corpus and remanding the relator has been unanimously affirmed by an order of the Appellate Division an appeal cannot be taken to the Court of Appeals unless the appeal involves the construction of the Constitution of this state or of the United States (Code Civ. Pro. § 190), and where the appellant avers that he is held in imprisonment by virtue of a sentence and judgment which the court had not the power to render and which is, therefore, void, but the appeal involves only the determination of the meaning and not the validity of the statutes conferring jurisdiction upon the court, and does not present the constitutionality of the statutes in question or the construction of the Constitution of the state, such appeal must be dismissed.

People ex rel. Curtis v. Kidney, 183 App. Div. 451, appeal dismissed.

(Submitted December 10, 1918; decided January 14, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 5, 1918, which *unanimously* affirmed an order of the Cayuga County Court dismissing a writ of habeas corpus and remanding the relator to custody.

The facts, so far as material, are stated in the opinion.

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Marquis Curtis, appellant, in person. An appeal properly lies to this court. Constitutional questions are involved. (*Meigan v. Row*, 166 App. Div. 175; 216 N. Y. 677; *Halpern v. Sanjorasck Bros.*, 169 App. Div. 468; *People ex rel. Buckbee v. Biggs*, 171 App. Div. 373; *Chandler v. Avery*, 47 Hun, 9; *People v. Calabur*, 91 App. Div. 529; *Wiemer v. Brambury*, 30 Mich. 201; *Stuart v. Palmer*, 74 N. Y. 183; *People ex rel. Witherbee v. Supervisors*, 70 N. Y. 234.)

Benn Kenyon and *Harry E. Lewis*, District Attorneys (*Harry G. Anderson* of counsel), for respondent. The order is not appealable to this court as a matter of right. (Code Civ. Pro. § 190.)

COLLIN, J. *Marquis Curtis*, confined in the prison at Auburn under conviction and sentence, secured the writ of habeas corpus to inquire into the cause of his detention, returnable on April 1, 1918, before the county judge of Cayuga county. The County Court, after a hearing, by an order, dismissed the writ and remanded him. The Appellate Division, upon his appeal, by its order entered June 5, 1918, unanimously affirmed the order of the County Court. The appeal here is from the order of affirmance.

At the outset, we must determine whether or not we have the power or jurisdiction to review the unanimous order of the Appellate Division, or, in more direct statement, whether the proceeding by writ of habeas corpus is a civil proceeding or a criminal proceeding. If it is a civil proceeding we have not power to review the order, because of the restriction imposed by section one hundred and ninety of the Code of Civil Procedure in this language: "From and after the 31st day of May, 1917, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon

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appeal of an actual determination made by an appellate division of the supreme court in either of the following cases, and no others: 1. An appeal may be taken as of right to said court from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding where is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification." The section has three other subdivisions, not one of which has a relevancy to the order here. We have uniformly held that all proceedings in a criminal action or proceeding are, generally speaking, governed by the Code of Criminal Procedure. (*People v. Redmond*, 225 N. Y. 206.) The Code of Criminal Procedure does not contain an enactment like unto section one hundred and ninety of the Code of Civil Procedure. The appeal at bar does not involve the construction of the Constitution of the state or of the United States, nor did a justice of the Appellate Division dissent from its decision. Therefore, if the appeal is in a civil proceeding, it must, under the mandate of the statute, be dismissed.

It has been stated by text-writers and in judicial opinion that the courts of England have not declared the proceeding by the writ of habeas corpus to inquire into the cause of detention either civil or criminal in its nature. (*Martin v. District Court*, 37 Colo. 110. See, also, *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559; *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305.) The courts of our country, compelled by legislative enactments regulating appellate jurisdiction or other matters of procedure, have been constrained to be more bold. In *Ex parte Tom Tong* (108 U. S. 556) is, unquestionably, the leading decision determining the nature of the proceed-

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ing. There, as here, the jurisdiction of the court depended on whether the proceeding was to be treated as civil or criminal; if civil, the court had not, if criminal, it had jurisdiction. The petitioner, Tom Tong, was restrained of his liberty, because of alleged violation of law, under criminal process. The court said: "Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the Constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution." (p. 559.) It refused to take jurisdiction. It has consistently followed the decision. (*Kurtz v. Moffitt*, 115 U. S. 487, 494; *Cross v. Burke*, 146 U. S. 82, 88; *Matter of Frederick*, 149 U. S. 70, 75; *Fisher v. Baker*, 203 U. S. 174, 181.) Its reasoning and conclusion have been adopted by the greater number of the states in which codes regulate procedure. (*State ex rel. Durner v. Huegin*, 110 Wis. 189, 220; *Matter of Thompson*, 85 N. J. Eq. 221, 248; *Selicow v. Dunn*, 100 Neb. 615; *Henderson v. James*, 52 Ohio St. 242, 259;

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State ex rel. Board of Education of St. Louis v. Nast, 209 Mo. 708, 731; *State ex rel. Beekley v. McDonald*, 123 Minn. 84; *Orr v. Jackson*, 149 Iowa, 641; *State ex rel. Brandegee v. Clements*, 52 Montana, 57.) A few of the states declare the doctrine that the cause of the restraint determines whether the proceeding be civil or criminal. If the applicant for the writ be restrained by reason of the commission of a crime or of a criminal charge it is criminal; if otherwise it is civil. (*Legate v. Legate*, 87 Texas, 248; *Gleason v. Board of Commissioners of McPherson County*, 30 Kansas, 53.)

The legislature of this state has classified the proceeding as a civil proceeding. The Code of Civil Procedure enumerates the writ as a state writ (Section 1991), and contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it (Sections 2015–2066), including those relating to rights of appealing (Sections 2058–2064; *People ex rel. Hubert v. Kaiser*, 206 N. Y. 46). It is a special proceeding (Sections 3333, 3334). The title relating to state writs is designated, “Special Proceedings instituted by State writ,” and sections within the title frequently refer to such proceedings as special. It is a civil special proceeding (Section 3343, subdiv. 20). The Code of Criminal Procedure defines “Special proceedings of a criminal nature.” (Section 2; part VI.) The proceeding by writ of habeas corpus is not one of the special proceedings of a criminal nature, and, assuredly, it is not within the definition of a criminal action. (Code of Civil Procedure, sections 3335, 3336, 3337; Code of Criminal Procedure, section 5.) The Code of Criminal Procedure does not contain a provision authorizing or permitting an appeal to the Appellate Division from the final order in the habeas corpus proceeding (Sections 515, 517, 749, 750), and it applies only to criminal actions, and all other proceedings in criminal cases which are therein provided

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for (Section 962). The proceeding by writ of habeas corpus is not therein provided for and is not thereby classified as a special proceeding of a criminal nature. (*People ex rel. Taylor v. Forbes*, 143 N. Y. 219.)

While the legislative classification is not controlling, because the legislature cannot, in such manner, create or destroy the actual nature of an action or proceeding, it is very significant and is in accord with the highest judicial opinion. We hold that the proceeding by the writ of habeas corpus to inquire into the cause of the detention of a person is a civil special proceeding to enforce a civil right, although its purpose is to effect the release of the person from imprisonment or custody under a criminal prosecution.

Legislative enactments prescribing and defining the rights of appeal are with us imperative. We have no jurisdiction to hear an appeal unless it is conferred by statute. Courts which are created by written law, and whose jurisdiction is, as is ours, defined by written law, cannot transcend that jurisdiction. This is the established rule in all actions and proceedings, civil or criminal or of a criminal nature. (*People ex rel. Commissioners of Charities v. Cullen*, 151 N. Y. 54.) Section one hundred and ninety forbids us from reviewing the order here appealed from. There is no merit in the appellant's assertion and argument that this proceeding directly involved the construction of the Constitution of the state. He avers that he is held in imprisonment by virtue of a sentence and judgment which the court had not the power to render and, therefore, are void. Whether or not the court had the power is determinable only through the interpreting of statutes. The meaning and not the validity of the statutes is involved. In a certain sense, perhaps, each enforcement of a statute by a court involves its constitutionality or the construction of the Constitution of the state. That sense,

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however, was not within the legislative mind or intention in enacting the present restriction of our jurisdiction. An appeal, upon the ground the appellant here asserts, must present to us directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States. (*People ex rel. Moss v. Supervisors of Oneida Co.*, 221 N. Y. 367; *Matter of Haydorn v. Carroll*, 225 N. Y. 84.)

The appeal should be dismissed but, as the costs are discretionary (Code of Civil Procedure, sections 3240, 2007; *Matter of Holden*, 126 N. Y. 589; *Matter of Teese*, 32 App. Div. 46; *Matter of Barnett*, 11 Hun, 468), without costs.

HISCOCK, Ch. J., CHASE, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ., concur.

Appeal dismissed.

AUGUSTA DOCTOR et al., Appellants, v. AUGUSTUS S. HUGHES et al., Respondents, and JAMES FRANK, as Trustee in Bankruptcy of ELIZABETH L. HUGHES, Appellant, Impleaded with Another.

Real property — trusts — remainders — reversion — express trust conveying real property to trustee to pay income thereof to grantor with directions to convey to grantor's heirs upon his death — when such trust does not transform the reversion to grantor's heirs into a remainder.

1. Where there was no adequate disclosure of a purpose in the mind of a grantor, who created a trust, to vest his presumptive heirs with rights which it would be beyond his power to defeat, and the grant by its terms was subject to destruction at the will of the trustee, it was also subject to destruction, as against the heirs at law, at the will of the grantor. They had an expectancy but no estate.

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2. Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to the person creating the trust or his heirs (Real Property Law, § 102), and where the owner of real property conveyed it to a trustee to pay to grantor a certain sum from the rents and profits and also some debts and mortgages on the property, the trustee to have power to mortgage for the payment of liens and also to sell or reconvey to the grantor, and upon the death of the grantor the property, if not sold, to be conveyed to his heirs at law, or, if sold, the remainder of the proceeds of sale to be paid to them, such trust did not create a life estate in the trustee with remainder over to the heirs of grantor. His heirs at law, if they receive anything on his death, will take by descent and not by purchase, and hence there is nothing that creditors of such heirs can seize.

Doctor v. Hughes, 174 App. Div. 767, affirmed.

(Argued December 10, 1918; decided January 14, 1919.)

APPEAL from a judgment entered December 12, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

M. G. Holstein for plaintiffs, appellants. Under the deed of trust made by her father, the defendant Elizabeth L. Hughes is a person in being who would have an immediate right to the possession of one-half of the trust estate on the determination of the precedent estate by the death of her father, and her interest, whether vested or contingent, is descendible, devisable and alienable in the same manner as an estate in possession. (*Moore v. Littel*, 41 N. Y. 66; *Clowe v. Seavey*, 208 N. Y. 496; *Jackson v. Sheridan*, 50 N. Y. 660; *Jackson v. Littell*, 56 N. Y. 111; *House v. McCormick*, 57 N. Y. 316; *Smith v. Scholtz*, 68 N. Y. 61; *Kelso v. Lorillard*, 85 N. Y.

184; *Surdam v. Cornell*, 116 N. Y. 309; *Campbell v. Stokes*, 142 N. Y. 30; *Losey v. Stanley*, 147 N. Y. 567; *Matter of Dows*, 167 N. Y. 233; *Dougherty v. Thompson*, 167 N. Y. 487; *Baltes v. Union Trust Co.*, 180 N. Y. 187; *Matter of Easterly*, 202 N. Y. 474.) The interest of the defendant Elizabeth L. Hughes under the deed of trust executed by her father constitutes "property" held in trust for her within the meaning of article 1, title 4, chapter 15, of the Code of Civil Procedure, and this action in equity is properly brought to reach the same. (*Bergmann v. Lord*, 194 N. Y. 70; *Degraw v. Clason*, 11 Paige, 136; *Stringer v. Young*, 191 N. Y. 157; *Smith v. Edwards*, 88 N. Y. 92; *Ham v. Van Orden*, 84 N. Y. 257; *Williams v. Thorn*, 70 N. Y. 270; *Wetmore v. Truslow*, 51 N. Y. 338; *Burrill v. Sheil*, 2 Barb. 457; *Lawrence v. Bayard*, 7 Paige, 70; *Hallett v. Thompson*, 5 Paige, 583; *Zarthan v. Ditmars*, 37 App. Div. 173.)

James Frank for defendant, appellant. The interest of the defendant Elizabeth L. Hughes under the deed of trust made by her father constituted "property" and, subject to the life estate of her father, she had an undivided one-half interest in the corpus of the trust, her interest being either vested or contingent. In either case, it was "property" and her conveyance on June 12, 1902, to her husband, the defendant Augustus S. Hughes, constituted a transfer of property. (*Clowe v. Seavey*, 208 N. Y. 496; *Moore v. Littel*, 41 N. Y. 66; *Ham v. Van Orden*, 84 N. Y. 257; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Dodge v. Stevens*, 105 N. Y. 585; *Griffin v. Shepard*, 124 N. Y. 70; *Matter of Pell*, 171 N. Y. 48; *Roosa v. Harrington*, 171 N. Y. 341; *Baltes v. Union Trust Co. of N. Y.*, 180 N. Y. 183; *Nat. Park Bank v. Billings*, 144 App. Div. 536; 203 N. Y. 556; *Bergmann v. Lord*, 194 N. Y. 70.) Such interest of the defendant Elizabeth L. Hughes under the deed of trust made by her father

was a vested remainder — vested in her and her sister Sara E. Teché — the enjoyment only being postponed until the death of their father. (*Roosa v. Harrington*, 171 N. Y. 341; *Lytle v. Beveridge*, 58 N. Y. 592; *Miller v. Von Schwarzenstein*, 51 App. Div. 18; *Manice v. Manice*, 43 N. Y. 303; *Embury v. Sheldon*, 68 N. Y. 227; *Thomson v. Hill*, 87 Hun, 111; *Hersee v. Simpson*, 154 N. Y. 496; *Johnson v. Brasington*, 156 N. Y. 181; *Riker v. Gwynne*, 201 N. Y. 143; *Bushnell v. Carpenter*, 92 N. Y. 270.)

Joseph Day Lee for respondent. In directing that, upon the death of the settlor, the trustee should convey the trust estate to the grantor's heirs at law, there was no intention to create any kind of remainder, either vested or contingent, in those who might then answer that description, but merely intended to direct that the property should pass according to law. (*Whitemore v. Equitable Trust Co.*, 162 App. Div. 607; *Goodwin v. B. T. Co.*, 87 Misc. Rep. 130; *Cram v. Walker*, 173 App. Div. 804.)

CARDOZO, J. The action is brought by judgment creditors to subject what is alleged to be an interest in real property to the lien of a judgment.

In January, 1899, James J. Hanigan conveyed to a trustee a house and lot in the city of New York. The conveyance was in trust to pay from the rents and profits to the use of the grantor the yearly sum of \$1,500. The payments might, however, exceed that sum in the discretion of the trustee. Direction was also made for the payment of some debts, and for the payment of two mortgages then liens upon the property. The trustee was empowered to mortgage, in order to pay existing liens, or to carry into effect the other provisions of the deed. He was also empowered to sell. Upon the death of the grantor, he was to "convey the said premises (if not sold) to the heirs at law of the party of the first part." In

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case of a sale, he was to pay to the heirs at law "the balance of the avails of sale remaining unexpended." He was authorized at any time, if he so desired, to reconvey the premises to the grantor, and thus terminate the trust.

At the trial of this action, the grantor was still alive. His sole descendants were two daughters. By deed executed in June, 1902, one of the daughters, Mrs. Hughes, conveyed to her husband all her interest in this real estate. Judgment against Mr. and Mrs. Hughes for upwards of \$4,000 was afterwards recovered by the plaintiffs. The question to be determined is whether either judgment debtor has any interest in the land. The Special Term held that there passed to Mr. Hughes under the conveyance from his wife an estate in remainder which was subject to the claims of creditors. The Appellate Division held that the creator of the trust did not intend to give a remainder to any one; that his heirs at law, if they receive anything on his death, will take by descent and not by purchase; and hence that there is nothing that creditors can seize. ✓

We reach the same conclusion. The direction to the trustee is the superfluous expression of a duty imposed by law. "Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs" (Real Prop. Law, sec. 102; Consol. Laws, chap. 50). What is left is not a remainder (Real Prop. Law, sec. 38), but a reversion (Real Prop. Law, sec. 39). To such a situation neither the rule in *Shelley's* case (1 Coke Rep. 104), nor the statute abrogating the rule (Real Prop. Law, sec. 54), applies. ✓

The heirs mentioned in this deed are not "the heirs of a person to whom a life estate in the same premises is given" (Real Prop. Law, sec. 54). The life estate belongs to the trustee. The heirs are the heirs of the

grantor. There is no doubt that a gift to A for life with remainder to A's heirs, gives to such heirs a vested, though defeasible, estate (*Moore v. Littell*, 41 N. Y. 66; *Clowe v. Seavey*, 208 N. Y. 496, 502). But here the question is not whether a remainder is contingent or vested. The question is whether there is any remainder at all. In the solution of that problem, the distinction is vital between gifts to the heirs of the holder of a particular estate, and gifts or attempted gifts to the heirs of the grantor. "A man cannot either by conveyance at the common law, by limitation of uses, or devise, make his right heir a purchaser" (*Pibus v. Mitford*, 1674, 1 Vent. 372; *Read v. Erington*, 1594, Cro. Eliz. 322; *Bingham's Case*, 2 Co. Rep. 91 a, 91 b; *Cholmondeley v. Maxey*, 12 East, 589, 603, 604). "It is a positive rule of our law" (Hargrave's Law Tracts, 1787, p. 571). "If a man make a gift in taile, or a lease for life, the remainder to his own right heirs, this remainder is void, and he hath the reversion in him; for the ancestor during his life beareth in his body (in judgment of law) all his heires, and therefore, it is truly said that *haeres est pars antecessoris*" (Coke Litt. 22b). To the same effect are all the commentators (1 Fearne Contingent Rem. 21; 2 id. 205 [sec. 389]; 2 Washburn on Real Prop. [6th ed.] sec. 1525; Vin. Abr., Rem. A, p. 11; Bacon Abr., Uses, B2; Gilbert Uses, 20; Preston on Estates, 291; 24 Halsbury, Laws of England, pp. 213, 214). The heirs have a mere expectancy, *spes successionis* (*Matter of Parsons*, L. R. 45 Ch. D. 51, 55), which may be barred by deed or will. This rule that a reservation to the heirs of the grantor is equivalent to the reservation of a reversion to the grantor himself, is not to be confused with the rule in *Shelley's case*.^X The two are quite distinct (*Alexander v. de Kermel*, 81 Ky. 345, 351, 352). The one "applies only to the acts of an ancestor as between him and his own heirs" (Hargrave,

supra). The other is confined to the limitation of an estate of inheritance to the heirs of a person who has taken under the same instrument a prior estate of freehold (*Campbell v. Rawdon*, 18 N. Y. 412, 420; 29 L. R. A. N. S. 1016).

At common law, therefore, and under common-law conveyances, this direction to transfer the estate to the heirs of the grantor would indubitably have been equivalent to the reservation of a reversion. In England, the rule has been changed by statute. The Inheritance Act of 1833 provides (3 & 4 Wm. IV, chap. 106, sec. 3) that "when any land shall have been limited by any assurance * * * to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof." But in the absence of modifying statute, the rule persists to-day, at least as a rule of construction, if not as one of property. There are modern instances of its application to facts hardly to be distinguished from those of the case at bar (*Alexander v. de Kermel*, 81 Ky. 345; *Akers v. Clark*, 184 Ill. 136; *Hobbie v. Ogden*, 178 Ill. 357; *Robinson v. Blankenship*, 116 Tenn. 394). The reservation of a reversion is not inconsistent with the creation of a trust to continue until the death of the reversioner (*Doane v. Mercantile Trust Co.*, 160 N. Y. 494; *Matter of Asch*, 75 App. Div. 486, 495). We do not say that the ancient rule survives as an absolute prohibition limiting the power of a grantor. At the outset, probably, like the rule in *Shelley's* case (*Webb v. Sweet*, 187 N. Y. 172, 176), it was a rule, not of construction, but of property. But it was never applied in all its rigor to executory trusts (*Sackville-West v. Holmesdale*, L. R. 4 H. L. 543; *Cushing v. Blake*, 30 N. J. Eq. 689; *Locke v. Southwood*,

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[167] 1 My. & Cr. 411; *Trevor v. Trevor*, 1 P. Wms. 622, 631; S. C., 1 Eq. Cas. Abr. 387, 391; affd., 5 Bro. P. C. 122; 29 L. R. A. N. S. 1136; Watkins on Descents, p. 145; Fearné Cont. Rem., p. 145; Halsbury, *supra*, p. 214), which were "moulded by the court as best to answer the intent of the person creating them" (Watkins, *supra*). We may assume that this is the principle that would control the courts to-day. Executory limitations are no longer distinguished from remainders, but are grouped with them as future estates (Real Prop. Law, secs. 36, 37; *Tilden v. Green*, 130 N. Y. 29, 47), and deeds, like wills, must be so construed as to effectuate the purpose of the grantor (Real Prop. Law, sec. 240, subd. 3). There may be times, therefore, when a reference to the heirs of the grantor will be regarded as the gift of a remainder, and will vest title in the heirs presumptive as upon a gift to the heirs of others (*Whipple v. Fairchild*, 139 Mass. 262; *Heard v. Horton*, 1 Denio, 165; *Moore v. Littel*, *supra*; 2 Fearné Cont. Rem., p. 202, sec. 388). Even at common law, a distinction was taken between grants to the heirs as such, and grants where the reference to heirs was a mere *descriptio personarum* (*Brown v. Lyon*, 6 N. Y. 419, 421; *Heard v. Horton*, *supra*; 29 L. R. A. N. S. 1012). But at least the ancient rule survives to this extent, that to transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such a purpose. No doubt there are circumstances on which it is possible to build an argument. The grantor instructs the trustee, at the end of the life estate, to convey the land (if unsold) to the heirs, and if there has been a sale to pay the proceeds to the heirs. The more appropriate direction, if the grantor retained a reversion, would have been for payment of the proceeds of any sale to the executors or next of kin. "If the ancestor devises his

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estate to his heir at law by will, with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase" (2 Bl. Comm. 241). But the words heirs and next of kin are often employed as interchangeable. In this instance, the two classes are in fact identical. Nothing in the surrounding circumstances suggests a purpose to vary the course of descent or distribution as it would be regulated by law. If that is so, the courts are not to be controlled by mere inaccuracies of expression (*Lawton v. Corlies*, 127 N. Y. 100, 106, 108; *Montignani v. Blade*, 145 N. Y. 111, 122; *Matter of James*, 80 Hun, 371; *Matter of Fidelity Trust & Guaranty Co.*, 57 App. Div. 532, 539; *White v. Stanfield*, 146 Mass. 424, 434; *Kendall v. Gleason*, 152 Mass. 457, 462). Such slips of speech might be significant if we were construing an admitted remainder. They do not turn into a remainder what would otherwise be a reversion. There is no adequate disclosure of a purpose in the mind of this grantor to vest his presumptive heirs with rights which it would be beyond his power to defeat. No one is heir to the living; and seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs. This grant by its terms was subject to destruction at the will of the trustee. We think it was also subject to destruction, as against the heirs at law, at the will of the grantor. They had an expectancy, but no estate.

The judgment should be affirmed with costs.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur.

Judgment affirmed.

ANNIE P. WARD, Appellant, v. NEW YORK LIFE INSURANCE COMPANY, Defendant, and WALTER K. WARD et al., Respondents.

Evidence — insurance (life) — claim that insurance policy was assigned by husband to his wife by oral assignment — testimony of person claiming insurance under such alleged assignment not barred under the statute (Code Civ. Pro. § 829) — when evidence to sustain claim under oral assignment not sufficient to show that claimant is entitled to insurance as against beneficiaries named in policy.

1. In applying the rule and test that the plaintiff must establish his claim by a fair preponderance of evidence, it very likely will and should occur that the triers of fact will more carefully and critically scrutinize evidence offered against a dead person's estate for the purpose of deciding whether it does furnish the necessary weight and preponderance, than would be done if the testimony was offered against one who was alive to contradict it, but the general rule as to weight and quality of evidence is no different in one case than in the other. (*McKeon v. Van Slyck*, 223 N. Y. 392, 397, approved; *Rosseau v. Rouss*, 180 N. Y. 116; *Hamlin v. Stevens*, 177 N. Y. 39; *Wallace v. Wallace*, 216 N. Y. 28, explained.)

2. When section 829 of the Code of Civil Procedure speaks of deriving title or interest from, through or under a deceased person it contemplates property or an interest which belonged to the deceased in his lifetime and the title to which has passed by assignment or otherwise through him to the party who is protected by the section. These authorities do not contemplate a case where a party claims property from a third person which never belonged to the deceased and which in fact did not come into existence until his death.

3. A person claiming money directly from an insurance company by virtue of a designation under a policy cannot be said to be claiming "from, through or under" the insured in said policy even though the latter has made the designation.

4. Plaintiff claims an oral assignment of an insurance policy which was issued to her deceased husband upon his life payable to his personal representative or assigns. His sons were designated by him and recognized by the insurance company as beneficiaries under the policy. The wife claims the proceeds of the policy under an equitable parol assignment for value antedating the designation of the sons as

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beneficiaries. The testimony relied upon by plaintiff is to the effect that the insured said he had assigned to her his life insurance or his life insurance policies, and she says that on the strength of these statements she from time to time loaned him various sums of money, reaching in the aggregate a considerable amount. The insured never executed any written assignment and never delivered to her or surrendered control over the policy. *Held*, that she failed as matter of law to produce evidence which would have permitted the court to find that an assignment had been made.

Ward v. N. Y. L. Ins. Co., 175 App. Div. 961, affirmed.

(Argued December 9, 1918; decided January 14, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 17, 1916, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

E. R. Shepard, Luther A. Wait, Sheridan P. Wait and Edgar T. Brackett for appellant. The policy in suit was duly assigned by the insured to the plaintiff in 1909 as collateral security for money and credit already loaned, and she thereby and thereupon took a vested interest in such policy good as against everyone but a prior assignee. (*Cellery v. John Hancock Ins. Co.*, 57 App. Div. 227; *Smith v. N. B. Society*, 123 N. Y. 85; *Sabin v. Phinney*, 134 N. Y. 423; *Shipman v. Protected Home Circle*, 174 N. Y. 398; *M. R. Ins. Co. v. Cleveland Mills*, 82 Fed. Rep. 508; *Slocum v. N. W. Ins. Co.*, 115 N. W. Rep. 769; *McNeil v. Chinn*, 101 S. W. Rep. 465; *Baker v. Crosby*, 33 N. Y. S. R. 757; *McDonough v. Aetna L. Ins. Co.*, 38 Misc. Rep. 628; *Griffin v. P. Ins. Co.*, 43 App. Div. 499.) It was error for the court to strike out the testimony of the plaintiff under section 829 of the Code of Civil Procedure. (*Lyon v. Whittaker*, 77 Hun, 107; *Abbott v. Doughan*, 204 N. Y. 223; *Cary v.*

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White, 59 N. Y. 336; *Simmons v. Sisson*, 26 N. Y. 264; *Lobdell v. Sisson*, 36 N. Y. 327; *Eddington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *People v. Schuyler*, 43 Hun, 88; 106 N. Y. 298; *Bopple v. Supreme Tent*, 18 App. Div. 488; *Savage v. Modern Woodmen*, 113 Pac. Rep. 802; *Williams v. Campbell*, 84 Kan. 46.)

Andrew J. Nellis and *Walter E. Ward* for respondent. Had plaintiff appellant's testimony been retained and considered there was insufficient evidence to support a finding that the policy in suit was ever assigned to her. (*L. W. P. Co. v. S. W. P. Co.*, 178 N. Y. 221; *Rupp v. Blanchard*, 34 Barb. 629; *Thomas v. N. Y. & G. L. R. Co.*, 139 N. Y. 179; *Fairbanks v. Sargent*, 117 N. Y. 320; *Donovan v. Middlebrook*, 95 App. Div. 366; *Holmes v. Bell*, 139 App. Div. 462; *Matter of Van Alstyne*, 207 N. Y. 307; *Bowers v. Johnson*, 49 N. Y. 435; *Hamlin v. Stevens*, 177 N. Y. 39; *Taylor v. Higgs*, 202 N. Y. 65.) Appellant was not competent to testify to the personal transactions and communications between her and the insured in his lifetime. (*Sabin v. Grand Lodge*, 8 N. Y. Supp. 185; 6 N. Y. S. R. 151; *Barry v. E. L. Assur. Society*, 59 N. Y. 587.)

HISCOCK, CH. J. The New York Life Insurance Company issued a policy on the life of one Ward in the sum of \$5,000, payable on death of the insured to his executors, administrators or assigns. The policy also contained a provision that the insured might at any time change the beneficiary under said policy by written notice and indorsement of the change on the policy by the company. When Ward died opposing claimants to the proceeds of the policy appeared. One side were his sons who a short time before his death had been duly designated and by the company recognized as beneficiaries under the policy. On the other side appeared

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the wife who claimed the proceeds of the policy under an equitable parol assignment for value antedating the designation of the beneficiaries. The company paid the proceeds into court to be contested for by the opposing claimants and judgment has thus far proceeded in favor of the beneficiaries as against the alleged assignee.

While there is no claim that the designation of the defendant beneficiaries was for a valuable consideration, there is on the other hand no question that their designation was made in proper form. The claim of the appellant to an assignment of the policy rests entirely on parol testimony. Two witnesses gave evidence to the effect that the insured had in substance stated that he had made an assignment of his insurance to his wife. The main testimony, however, to sustain the alleged assignment was given by the wife herself who first testified that on one occasion some time before her husband's death, when he desired to borrow some money from her he stated in substance that he would give her a note for what he already owed and would execute as security for new loans assignments of life insurance policies, which it may be inferred included the present one, and that thereupon she loaned him some money. In subsequent testimony, however, she varied her account of this interview and testified to statements then made by her husband which were in conformity with those said to have been made by him at various subsequent times and which were to the effect that he had assigned his life insurance policies to her, that she did not need be afraid to loan him money because she would be repaid or was secured by assignments of his insurance, etc. These statements, which are the ones relied upon on this appeal, were, therefore, to the effect that the insured had assigned to the appellant his life insurance or his life insurance policies, and she says that on the strength of these statements she from time to time loaned him various sums of money reaching

in the aggregate a considerable amount. There is no other intelligible evidence tending to support the theory of an assignment. There is some evidence drawn out by counsel for respondents, on his cross-examination, about a paper or notice said to be from the insurance company and on which there was written: "This is payable to my wife, Annie P. Ward or Annie Page Ward, I could not tell you which." But this evidence is so indefinite that it is not cited in any way by appellant's counsel on this argument and we think does not contribute any support to appellant's claim. The policy was never delivered to appellant, it being given as an excuse by the insured that it was pledged with the company; no paper was ever executed and no notice ever given by the alleged assignee to the insurance company or received by her from the latter, and no step was ever taken which was effective to actually accomplish an assignment. Outside of the alleged statement by the insured that the policy was deposited with the insurance company there is no evidence of that fact and the insured never surrendered control over the policy but continued to exercise such control for several years between the date of the first alleged conversation and his death, if in no other way, by making new designations of beneficiaries. Other policies which appellant says were assigned to her by her husband were in his safe deposit box and these were not delivered to her.

The first question which arises pertains to the admission of evidence. As appears, the appellant, in spite of timely objections, was permitted to testify concerning personal transactions between her and her husband for the purpose of establishing the alleged assignment. Subsequently all of this evidence was stricken out as incompetent under section 829 and it becomes necessary to decide which ruling of the trial judge was correct — that admitting the evidence, or that striking it out.

We think the evidence was competent as against the respondents as beneficiaries under the policy. It was thus competent unless it can be said that they derived their "title or interest from, through or under a deceased person * * * by assignment or otherwise," and we do not think that a person claiming money directly from an insurance company by virtue of a designation under a policy can be said to be claiming "from, through or under" the insured in said policy even though the latter made the designation. Of course it must be admitted that in a substantial sense it is due to the act of the insured that the beneficiary becomes entitled to the proceeds of the policy. Without such act the latter would have no claim. What was said by Judge CULLEN in *Matter of Dows* (167 N. Y. 227, 231) when speaking of title under a power of appointment is quite as applicable in the case of a designation of a beneficiary under an insurance policy. He said: "But whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." Nevertheless with very limited exceptions it has been held that the title of a grantee under a power of appointment comes from the donor of the power rather than from the one who exercises it (*Chanler v. Kelsey*, 205 U. S. 466, 474), and principles similar to those applied in the case of powers, we think lead to the conclusion that beneficiaries like the respondents secure their money from the insurance company and not from the insured who designated them. The great body of authority makes it plain, by inference at least, that when section 829 speaks of deriving title or interest from, through or under a deceased person it contemplates property or an interest which belonged to the deceased in his lifetime and the title to which has passed by assignment or otherwise

through him to the party who is protected by the section. These authorities do not contemplate a case where a party claims property from a third person which never belonged to the deceased and which in fact did not come into existence until his death.

No cases have been found in this state directly passing upon this question. The case of *Sabin v. Grand Lodge A. O. U. W.* (6 N. Y. S. R. 151), which has been cited as so doing, does not in fact do it. It was simply held in that case that on a consideration of the comparative rights of the contending parties evidence of personal transactions with the deceased should not be given, but the court expressly refrains from holding that the general rule was as now claimed by the respondents.

Various cases have been found outside of the state passing upon the question under statutes substantially similar to our own. In Michigan it has been held, somewhat doubtfully in the later cases, that evidence of personal transactions with the insured under circumstances analogous to those existing in this case is incompetent. (*Franken v. Sup. Ct.*, 152 Mich. 502; *Grand Camp, etc., v. Savage*, 135 id. 459; *Wallace v. Fraternal Mystic Circle*, 127 id. 387.) But the courts of Kansas, Illinois, Iowa, Pennsylvania and South Carolina have held a contrary view and have decided that a person occupying a position similar to that occupied by the respondents does not come within the purview of such a statute as our own section 829 of the Code. (*Shuman v. Sup. L. K. of H.*, 110 Iowa, 480; *Crowell v. N. W. Nat. L. Ins. Co.*, 140 id. 258; *Broadrick v. Broadrick*, 25 Pa. Sup. Ct. 225; *Hamill v. Sup. Council*, 152 Pa. St. 537; *Macaulay v. Central Nat. Bank*, 27 S. Car. 215; *Farrenkoph v. Holm*, 142 Ill. App. 336; *affd.*, 237 Ill. 94; *Savage v. Modern Woodmen*, 84 Kan. 63.) We think, therefore, it was error to strike out this evidence.

But even though it was technical error thus to rule,

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the question still remains whether appellant could have been helped by the evidence and whether, therefore, its loss was a source of any damage to her. We do not think it was. We think that on all of the evidence produced in her behalf, including that which was stricken out, she failed as matter of law to establish that she was an assignee of the involved insurance policy.

As has been pointed out, the only evidence of assignment cited or relied upon on this appeal consists of statements made by the insured that he had assigned his insurance to the appellant and we do not think that this is sufficient to establish an assignment. It very likely may be that under some circumstances a borrower might make statements respecting a transfer of securities to a proposed lender upon which the latter would be entitled to rely in making loans. But that does not seem to be this case. The appellant could not have been misled by the statements of her husband and there is no element of estoppel involved by virtue of which equity will treat as having been done that which ought to be done. The appellant knew whether an assignment had been made. She was not deceived by her husband's statements. She knew that he had never executed and delivered to her any written assignment of the insurance policy; that he had never in appropriate and effective language made a present transfer of the policy by parol to her; that she had never had possession of the policy, and that he had never done anything to, by or with her, symbolically or otherwise, to give her control of the policy. She had never given to or received from the insurance company any notice indicating transfer of ownership to her and she had no assurances that the insured was not exercising control and ownership over the policy as in fact he did do. Under these circumstances it seems to us that the loose, general statements by the insured that he had made a transfer of the policy were not sufficient evidence to

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establish even an equitable parol assignment to the appellant.

We are not adopting this view on the theory that because this assignment is claimed to have been made by a dead person it can only be established by a different kind and quality of evidence than would be sufficient if the transaction were alleged to have been with a living person, and for which theory support is sometimes supposed to be found in what was said in *Rousseau v. Rouss* (180 N. Y. 116); *Hamlin v. Stevens* (177 N. Y. 39); *Wallace v. Wallace* (216 N. Y. 28) and other similar cases. The rule in any civil case is that the plaintiff must establish his claim by a fair preponderance of evidence. He need do no more than this if his claim deals with a dead person; he cannot do less if he is attacking the rights and property of a living person. The general rule as to weight and quality of evidence is no different in one case than in the other. In applying the rule and test to specific evidence, however, it very likely will and should occur that the triers of fact will more carefully and critically scrutinize evidence offered against a dead person's estate for the purpose of deciding whether it does make the necessary weight and preponderance of evidence, than would be done if the testimony was offered against one who was alive to contradict it. This is what we construe the expressions in the opinions to which we have referred to mean. As was said by Judge CRANE in *McKeon v. Van Slyck* (223 N. Y. 392, 397), writing upon this subject: "In civil cases a plaintiff is never required to prove his case by more than a preponderance of evidence. This is as true of actions against an executor, founded on claims put forward for the first time after the death of the testator, as it is of other actions. * * * No doubt in determining whether the preponderance exists, the triers of the facts must not forget that death has sealed the lips of the alleged promisor. They may

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reject evidence in such circumstances which might satisfy them if the promisor were living. They must cast in the balance the evidence offered upon the one side and the opportunities for disproof upon the other. They may, therefore, be properly instructed that to make out a preponderance the evidence should be clear and convincing. * * * But all these instructions in last analysis are mere counsels of caution."

Our conclusion is that measuring appellant's case by the ordinary and standard rules she failed as matter of law to produce evidence which would have permitted the court to find that an assignment had been made. (*Wallace v. Ingersoll*, 89 N. Y. 508, 521; *Rupp v. Blanchard*, 34 Barb. 627, 629; *Holmes v. Evans*, 129 N. Y. 140, 145; *N. W. Mut. Life Ins. Co. v. Wright*, 153 Wis. 252; *Richardson v. White*, 167 Mass. 58; *Bowers v. Johnson*, 49 N. Y. 432, 434; *Cuyler v. Wallace*, 183 N. Y. 291; *Donovan v. Middlebrook*, 95 App. Div. 365.)

For these reasons we think the judgment should be affirmed, with costs.

COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur;
CHASE, J., concurs in result; CARDOZO, J., not voting.
Judgment affirmed.

JENNIE HERPE, Respondent, v. ISIDOR HERPE, Defendant, and THE GERMAN SAVINGS BANK OF BROOKLYN, Appellant.

Practice — amendments — judgments — costs — clerical errors or omissions in judgments or mistakes in entry thereof may be corrected — court may not by amendment correct errors in substance affecting a judgment — to withhold or award costs is a substantive part of a judgment in equity.

1. A trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting a judgment. It cannot, by amendment, change a judgment in matter of substance for error

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committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal. This rule is not in conflict with the provisions of sections 723 and 724 of the Code of Civil Procedure. Those provisions are not intended to affect the substantial rights of parties.

2. Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment. A provision withholding or awarding costs is a substantive part of a judgment in an action in equity and cannot be amended.

Herpe v. Herpe, 173 App. Div. 967, reversed.

(Submitted December 5, 1918; decided January 14, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 23, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term so far as appealed from.

The nature of the action and the facts, so far as material, are stated in the opinion.

Hector McG. Curren for appellant. In an equitable action the awarding of costs is within the discretion of the trial court and when that discretion is once exercised, that court cannot afterwards amend its decision in that respect. (*Kiernan v. Agricultural Ins. Co.*, 3 App. Div. 26; *Barnes v. M. R. R. T. Co.*, 44 App. Div. 795; *Beattie v. Qua*, 15 Barb. 32; *Sabater v. Sabater*, 7 App. Div. 70; *Kennedy v. McKone*, 10 App. Div. 97; *N. Y. Ins. Co. v. N. W. Co.*, 23 N. Y. 357; *Buckingham v. Dickinson*, 54 N. Y. 682; *Dalrymple v. Williams*, 63 N. Y. 361; *Gennert v. Butterick Pub. Co.*, 133 App. Div. 86; *Foley v. Foley*, 15 App. Div. 276.)

Leo Rosenberg for respondent. A party seeking a favor of the court must abide by the terms imposed, unless the

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judicial discretion be abused or mistakenly exercised. (*Matter of Waverly W. W. Co.*, 85 N. Y. 479; *Flannery v. James*, 18 Wkly. Dig. 557; *McCall v. McCall*, 54 N. Y. 541; *De Marco v. Mass.*, 31 Misc. Rep. 827; *Ridley v. M. Ry. Co.*, 72 Hun, 164; *Miller v. Sampson*, 84 Misc. Rep. 412.) The court below had the power to amend its judgment by awarding the costs of the action to the plaintiff in lieu of vacating the Municipal Court judgment and thus practically restore the plaintiff to the position originally occupied by her. (*Genet v. Del. & H. Can. Co.*, 136 N. Y. 217.)

COLLIN, J. The action, commenced May 20, 1915, was in equity to secure a judgment impressing a trust upon and adjudging the payment to the plaintiff of a sum of money deposited with the German Savings Bank of Brooklyn, the appellant, by Isidor Herpe in the name of I. Herpe in trust for Jennie Herpe, the respondent. Isidor was a defendant in the action and defaulted in appearance and pleading. The bank by an answer raised issues of fact and alleged, as a setoff, the recovery by it on February 5, 1915, of a judgment against the plaintiff in the sum of sixty dollars and twelve cents, as costs, in an action instituted by her against it on July 24, 1914. The plaintiff did not serve a reply. On November 3, 1915, the issues came on for trial, the bank failed to appear and an inquest was taken. Before further action was had the court opened the default of the bank upon condition that it, within three days after the entry of the order, stipulate in writing to offset the amount of its judgment of sixty dollars and twelve cents against the taxable costs in the present action; in case of failure to stipulate the trial to be had on a designated day. The bank did not stipulate and failed to appear at the trial on the designated day. The court thereupon made its decision and adjudged that the deposit was the property of and, with interest,

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should be paid to the plaintiff; that Isidor Herpe be barred of any right to it; that the counterclaim of the bank be dismissed and the judgment in favor of the bank against the plaintiff entered in the Municipal Court of the city of New York (the judgment alleged in the answer) be vacated and discharged of record, and that the judgment so directed herein be without costs. Judgment of such provisions and effect was entered December 30, 1915. Upon the motion of the bank, made to the Special Term, to vacate and set aside such judgment in so far as it attempted to dismiss the counterclaim of the bank and to vacate and discharge the judgment of the Municipal Court, opposed by the plaintiff, the court ordered: "the application is granted amending the judgment in so far as it orders the cancellation of the judgment of the Municipal Court. It is also further amended by awarding the full costs of the action to plaintiff." On January 26, 1916, an amending judgment was entered awarding the plaintiff costs of the action. The Appellate Division, upon the appeal of the bank "from that part of the judgment and order which adjudges that the plaintiff Jennie Herpe, do recover of the defendant, the sum of \$94.29, the costs as taxed, and that the plaintiff have execution therefor," affirmed the judgment and from the judgment of affirmance the appeal here is taken.

The original judgment, in so far as it, in form, vacated and discharged the judgment of the Municipal Court in favor of the bank and against the plaintiff here, was manifestly erroneous and illegal. The conclusion that the trial court had not the power to so adjudge does not require discussion. It is equally manifest, inasmuch as the action is in equity, that the trial court had the power to adjudge, as it did originally, that costs should not be awarded to either of the parties.

The application of the bank for the vacating or setting

aside of the erroneous and illegal part of the judgment was legal and regular. The Code of Civil Procedure provides: "A party aggrieved may appeal, in a case prescribed in this chapter, except where the judgment or order, of which he complains, was rendered or made upon his default." (Section 1294.) The bank, having defaulted at the trial, adopted the proper remedy.

The court had not the power to amend the judgment by awarding the costs of the action to the plaintiff. The rule has long been settled and inflexibly applied that the trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment. It cannot, by amendment, change the judgment in matter of substance for error committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal. (*Bohlen v. Met. El. Ry. Co.*, 121 N. Y. 546; *Gagnon v. United States*, 193 U. S. 451; *Matter of Ungrich*, 201 N. Y. 415, 418; *Heath v. New York Building Loan Banking Co.*, 146 N. Y. 260; *Stannard v. Hubbell*, 123 N. Y. 520; *Heinitz v. Darmstadt*, 140 App. Div. 252.) The rule is not in conflict with the provisions of sections 723 and 724 of the Code of Civil Procedure. Those provisions are not intended to affect the substantial rights of parties. (*Bohlen v. Met. El. Ry. Co.*, 121 N. Y. 546; *Heath v. New York Building Loan Banking Co.*, 146 N. Y. 260; *Chester v. Buffalo Car Mfg. Co.*, 183 N. Y. 425.) Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment. (*Bohlen v. Met. El. Ry. Co.*, 121 N. Y. 546; *Heath v. New York*

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Building Loan Banking Co., 146 N. Y. 260; *Corn Exchange Bank of Chicago v. Blye*, 119 N. Y. 414; *Card v. Meincke*, 70 Hun, 382.) A provision withholding or awarding costs is a substantive part of a judgment in an action in equity and cannot be amended. (*Stevens v. Veriane*, 2 Lans. 90; *Smith v. Smith*, 121 App. Div. 480; *Foley v. Foley*, 15 App. Div. 276.)

The record presents no fact which makes inapplicable to the amending judgment in the instant case those rules. They constrain us to reverse the judgment of the Appellate Division and the part of the amending judgment of the Special Term appealed from. It is urged, with reason, that the bank might, with complete safety, have prevented the prolonged litigation by an action of interpleader under the Code of Civil Procedure (Section 820a) or by being throughout less litigious and heedless of the plaintiff's equities. Costs of the appeals should not be awarded it.

The judgment of the Appellate Division and the judgment of January 26, 1915, of the Special Term so far as appealed from should be reversed, without costs

HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Judgment accordingly.

MARY R. WRIGHT et al., as Trustees under the Will of JAMES H. WRIGHT, Deceased, Respondents, v. MARY R. WRIGHT et al., Defendants, NEW YORK PUBLIC LIBRARY, Respondent, and KNICKERBOCKER HOSPITAL, Appellant.

Testamentary trust — gift of remainder of residuary estate to a library — consolidation of such library with a municipal public library and surrender of its charter before termination of the trust estate — legacy to library did not vest on death of testator and library having ceased to exist before life estate terminated, the legacy lapsed and became property as to which testator died intestate and passed to his heirs and next of kin.

1. The will of testator provided that one-third of his residuary estate should be held in trust during the life of a named beneficiary. After her death and after payment of certain specific bequests he directed that a certain sum be paid from this portion of his residuary estate to the Washington Heights Library in the city of New York upon condition that it should be maintained at all times as a free circulating library. The rest of the one-third so bequeathed he directed to be given an institution of which the defendant, the Knickerbocker Hospital, is the successor. An act was passed (L. 1901, ch. 57) whereby it was in substance provided that any corporation carrying on a library in the city of New York might convey and transfer all of its property to the New York Public Library on such terms, conditions and limitations as might be agreed upon between the two parties; also that the regents might "accept a surrender of the charter of the library corporation so conveying its property, and forever discharge its directors or trustees from their trusts in the premises," also that "any devise or bequest contained in any last will and testament made to any corporation conveying its property under the authority of this act, whether made before or after such conveyance, shall not fail by reason of such conveyance, but the same shall enure to the benefit of" the New York Public Library. After the passage of this act and before the expiration of the foregoing life trust, the Washington Heights Library took proper steps to transfer its property to the New York Public Library and surrender its charter, and subsequently the board of regents in accordance with the provisions of the statute accepted a surrender of the charter of the former library corporation.

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The sum bequeathed to the Washington Heights Library is claimed by the New York Public Library under the residuary clause. *Held*, that the bequest in favor of the Washington Heights Library did not vest on the death of the testator; and that before that corporation became entitled to its legacy under the will it had absolutely ceased to exist and the legacy, therefore, lapsed and did not pass to the New York Public Library as its successor under the foregoing proceedings. (*Matter of Bergdorf*, 206 N. Y. 309, distinguished.)

2. While as a general rule a residuary clause will include and be applicable to lapsed legacies, it is not the rule in respect of a residuary clause where the legacy which has failed and lapsed was itself part of a residue. In such case, on failure of the intended legacy of part of the residuum, the part as to which disposition has failed will go as in case of intestacy, and the residuum passing under the residuary clause will not be augmented by a "residue of a residue." Hence, the lapsed legacy does not fall into the residuum of the third residuary portion and does not pass under the residuary clause applicable to that portion to the appellant Knickerbocker Hospital, but becomes property as to which the testator died intestate and passes to his heirs and next of kin.

Wright v. Wright, 173 App. Div. 966, affirmed.

(Argued December 12, 1918; decided January 14, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 24, 1916, affirming a judgment in favor of defendant, respondent, entered upon the report of a referee in an action brought to settle judicially the accounts of the plaintiffs as trustees under the will of James H. Wright, deceased.

Eli J. Blair and *Frank H. Platt* for appellant. The legacy under review was intended for the Washington Heights Library and not the New York Public Library, Astor, Lenox and Tilden Foundations. This was testator's intent as evidenced by his will and all the surrounding circumstances. (*Matter of Thompson*, 217 N. Y. 111; *Matter of Briggs*, 180 App. Div. 752; *Lewis v. Palmer*, 167 N. Y. Supp. 1053.) The legacy in issue could not

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vest in the Washington Heights Library until the date of the death of the life tenant. The said Washington Heights Library having become defunct before that date, the legacy lapsed. (*Matter of Tamargo*, 220 N. Y. 225; *Matter of Wells*, 113 N. Y. 396; *Union Trust Co. v. Thompson*, 87 Misc. Rep. 31; *Sherman v. Richmond Hose Co.*, 101 Misc. Rep. 62; *Trust Co. of America v. United Box Board Co.*, 213 N. Y. 334; *Godwin v. Liberty-Nassau Building Co.*, 144 App. Div. 164; *Matter of Bain*, 104 Misc. Rep. 508; *Booth v. Cornell*, 2 Redf. 261; *Crum v. Bliss*, 47 Conn. 592.)

George L. Shearer for defendant, respondent. The conveyance by the Washington Heights Free Library to the New York Public Library effected a consolidation of the two corporations. (*L. & N. R. R. Co. v. Kentucky*, 161 U. S. 677; *Hale v. C. R. Co.*, 161 Mass. 443; *McVickar v. Ross*, 55 Barb. 247; *Hurd v. N. Y. & C. S. Laundry*, 29 Misc. Rep. 183; *Montgomery Co. v. Boring*, 51 Ga. 582; *Chicago Ry. Co. v. Ashling*, 160 Ill. 373.) By express provision of law the New York Public Library is entitled to the legacy given by Mr. Wright's will. (L. 1901, ch. 57.) The legacy to the Washington Heights Library vested at the testator's death. (Cons. Laws, ch. 50, § 59.) If the legacy to the library had lapsed, the Knickerbocker Hospital would not be entitled to that legacy. (*Kerr v. Dougherty*, 79 N. Y. 327; *Matter of Hoffman*, 201 N. Y. 247; *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86.)

HISCOCK, Ch. J. The questions which are presented to us upon this appeal arise under and in connection with the will of one Wright. For several years before his decease Mr. Wright lived in the territory known as Washington Heights. While this was located within the limits of New York city it was really a community by

itself, having local and distinct interests and institutions. Mr. Wright, who was a man of large means, became interested in at least two of these institutions which are the contending parties upon this appeal. These were the Washington Heights Library, a corporation of which the name was subsequently changed to that of Washington Heights Free Library, and the Manhattan Dispensary, a corporation of which the name was subsequently changed to that of Knickerbocker Hospital. Without going too much into details it may be stated generally that down to and for several years after the death of Mr. Wright the former institution maintained a public library which possessed as one of its features that of free circulation of books in the community in question. Mr. Wright seems to have been a contributor to the support of these institutions during life and he attempted by his will to make generous provision for their support after his death.

He died in 1894 and thereupon his will was admitted to probate. It disposed of a large amount of property and most of its provisions are not of any consequence in this discussion. After making many specific bequests he made provisions which present the questions now under consideration. He provided that in case he died without issue, which was what happened, his residuary estate after the above bequests should be divided by his executors into three parts and he provided for the disposition of the third of these residuary parts as follows:

“My executors and trustees shall hold the remaining one-third part of my residuary estate in trust to receive the rents, issues and profits thereof during the life of my said sister (duly designated in the will) and to pay the same to her or in case of her incapacity to apply the same for her personal and exclusive use, and after her death either after, before or with me, to pay or apply such income and principal as follows (and then after various specific bequests):

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"(g) I direct my executors and trustees to pay and deliver to the Washington Heights Library, in the City of New York, upon the condition that it shall be maintained at all times as a free circulating library, the sum of one hundred thousand dollars. * * *

"(i) All the rest, residue and remainder of the said one-third part of my residuary estate, shall be given and delivered to the Manhattan Dispensary * * * the principal of such sum to be kept invested and the income thereof to be maintained as a permanent investment during the continuing operation of the said Dispensary, * * *."

In 1892, or two years before the testator's death, chapter 541 of the laws of that year was passed, permitting the consolidation of library corporations in the city of New York. Provision was made for the manner in which consent to such consolidation was to be obtained from directors or trustees and stockholders in case there were any; that on completion of the consolidation all manner of rights and privileges and every species of property theretofore belonging to the separate companies should be deemed to be transferred to and vested in the new corporation; that rights of creditors of the individual companies should not be impaired but should become liabilities of the consolidated company and that pending suits should not be affected. In 1894 and after the death of the testator an amendment to this act was adopted wherein and whereby the express attempt was made to prevent the abatement of legacies and bequests to a library corporation entering into such a consolidation and to preserve the same for the benefit of the consolidated corporation.

The New York Public Library was organized by what amounted to a consolidation of the Astor, Lenox and Tilden Libraries under the name New York Public Library, Astor, Lenox and Tilden Foundations. In

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1901 and several years after the will of the testator had become effective an act was passed, being chapter 57 of the laws of that year, which is of supreme importance to respondent's claim and whereby it was in substance provided amongst other things that any corporation carrying on a library in the city of New York might convey and transfer all of its property to said New York Public Library on such terms, conditions and limitations as might be agreed upon between the two parties, provision being made for the manner in which this agreement should be authorized and executed; also that the regents of the university on being satisfied that any such library corporation had conveyed all of its property to the said New York Public Library under the authority of such act might "accept a surrender of the charter of the library corporation so conveying its property, and forever discharge its directors or trustees from their trusts in the premises;" that the New York Public Library should have power to hold and enjoy the property so conveyed to it and power to dispose of the same; also that "any devise or bequest contained in any last will and testament made to any corporation conveying its property under the authority of this act, whether made before or after such conveyance, shall not fail by reason of such conveyance, but the same shall enure to the benefit of" such New York Public Library.

Some time after the passage of this act and before the death of the testator's sister, who as already stated had a life interest in the residuary part from which the bequest to the Washington Heights Library was to be paid, said latter corporation took proper steps under the provisions of said act of 1901 to transfer its property to the New York Public Library and surrender its charter. It executed a proper and effective conveyance of its property to the latter under an agreement whereby that corporation in effect undertook to maintain in the

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region known as Washington Heights a public library such as had theretofore been maintained by the Washington Heights Library, and subsequently on proper proof of this conveyance and agreement the board of regents duly and in accordance with the provisions of said statute accepted a surrender of the charter of said former library corporation. Thereafter the sister, who was the life beneficiary, having died, the question arose concerning the disposition of the bequest of one hundred thousand dollars by the terms of the will made payable to the Washington Heights Library. It was and is contended by the Knickerbocker Hospital that said library corporation before the bequest to it had in any manner vested or become payable had ceased to exist by reason of the proceedings referred to and that, therefore, the legacy to it lapsed and passed under the residuary bequest to the hospital. The New York Public Library on the contrary contends, and with it thus far the courts have agreed, that under the act of 1901 and the steps taken in pursuance thereof by and between it and the Washington Heights Library the bequest has been preserved and passes to it as in some manner the successor to the Washington Heights Library. With this view we are unable to agree.

Some attempt, rather half-hearted as it seems to us, is made to argue that the bequest in favor of the Washington Heights Library vested on the death of the testator and that payment of it was only postponed until the death of the life beneficiary. If this were so it would of course be a complete answer to the claim of the hospital and would clearly and fully sustain the judgment which has been rendered. It seems to us very clear, however, that the legacy did not thus vest. The only bequest to the Washington Heights Library was by means of a trust with a direction "to pay and deliver" to it after the death of the life beneficiary under the trust.

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There are in the will no words or provisions which directly or indirectly import a present or vested gift or which indicate such an intent. The testamentary disposition is to the trustees in trust to collect the rents, issues and profits of this portion of the residuary estate during the life of the testator's sister and to pay the same to her and "after her death either after, before or with me to pay or apply such income and principal as follows," and then after other clauses the direction to the executors and trustees is to pay and deliver to the library as already indicated. Under these circumstances we have the simple case, free from complications, where there is no gift but by direction to trustees to pay at a future time, and in such a case it is perfectly well settled that the legacy will not vest in the beneficiary until the time for payment arrives. (*Warner v. Durant*, 76 N. Y. 133; *Smith v. Edwards*, 88 N. Y. 92, 109; *Delafield v. Shipman*, 103 N. Y. 463; *Shipman v. Rollins*, 98 N. Y. 311; *Rudd v. Cornell*, 171 N. Y. 114.)

Thus it results on this branch of the case that respondent is compelled to sustain the proposition that by virtue of the statute of 1901, passed long after testator's will had taken effect, and the acts performed thereunder, the New York Public Library has been substituted as a legatee for the Washington Heights Library and is entitled to the legacy by the will specifically and exclusively given to the latter. This proposition, that the legislature by act passed long after a will has gone into effect may provide for the substitution of some new person as legatee in the place of the one named in the will, is certainly a radical one and before we can assent to it there should be pointed out some certain and undoubted foundation upon which it may rest. In our opinion there has been an utter failure to do this in this case. Even if we should assume that with legislative aid there might be such a consolidation or merger of one corporation with

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or in another as would make the latter the successor of the former and carry to it the enjoyment of bequests to the former, not vested at the time of merger or consolidation, such assumption will not save the present claim of the respondent. In a legal sense there was no consolidation or merger by the Washington Heights Library with or in the New York Public Library and the latter did not in any legal sense become the successor of the former so as thereby to be entitled to its corporate rights and privileges. In a popular sense it is true that the continuing corporation undertook to carry out, and we will assume did carry out, the objects and duties of the former in the way of maintaining a free reference and circulating library in the community known as Washington Heights. But this was under a contract which in no proper sense made one corporation the successor to or embodiment of the other. Under the statute of 1901 the Washington Heights Library was permitted in effect to convey all of its property to the New York Public Library under an agreement by which the latter undertook to discharge the functions of the former. But it was part of the provisions which authorized this that after it had been done the Washington Heights Library should be entitled to surrender its charter and become extinct and this was what happened. It thus came about that before the Washington Heights Library became entitled to its legacy under the Wright will it had absolutely ceased to exist and the legacy had lapsed. Between it and the New York Public Library there is and can be no connection or succession as to this legacy because the end of the Washington Heights Library has not been merger or devolution into another corporation but absolute extinction under the statute. It seems to be so plain as not to permit serious doubt that under these circumstances the legislature could not permit or authorize a new corporation to take the place of one becoming

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extinct, for the purpose of securing a legacy vesting and becoming payable some time after the corporate death of the legatee.

The case of *Matter of Bergdorf* (206 N. Y. 309) has been cited with apparent confidence as sustaining the views which have led to the judgment thus far rendered. A reasonably careful consideration of that case, however, seems to make it plain that, so far as applicable, its authority and reasoning are entirely opposed to rather than in support of the judgment which has been rendered herein. In that case the Morton Trust Company was merged with the Guaranty Trust Company under provisions of the Banking Law which, amongst other things, provided that upon such a merger all the rights, franchises and interests of the corporation merging should be deemed to be transferred to and vested in the corporation into which it was merged. Under the will there involved the Morton Trust Company had been appointed an executor and the question was whether the right to this executorship passed to the Guaranty Trust Company into which the Morton Trust Company had been merged. In that case the statute authorizing such a merger and providing for the transfer of rights, privileges and property above referred to had existed for many years and the merger itself took place a year before the testator died and his will went into effect. Under these circumstances it was held by the court, concurring in the opinion of Judge COLLIN, that the Morton Trust Company did not continue to exist within or as a part of the Guaranty Trust Company and the two were not identical; that as a legal being, a corporate entity, the Morton Trust Company retained the one activity and power provided by the statute of suing and being sued and that otherwise it was non-existent, and certainly if that was true in that case it is true in this case where by action under the statute the Washington Heights Library has absolutely surrendered its charter

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and ceased to exist. Judge COLLIN then, however, pointed out that the right to make testamentary disposition was not an inherent one but was conferred by statute and subject to regulation, and that, therefore, "It was within the power of the legislature to enact that a trust company, into which another trust company lawfully designated as an executor had been merged subsequent to the making and *prior to the probate of the will*, should be the transferee of the privilege or right of being the executor." (p. 316.) And throughout the opinion holding that the Guaranty Trust Company was entitled to take and administer the executorship which had originally been conferred upon the Morton Trust Company there is emphasized the fact that the statute permitting this was passed and the merger itself accomplished before the will went into effect and that the testator in making his will and enjoying the testamentary privileges conferred by the statute did so subject to the statutory provisions then under consideration. That controlling feature is lacking in this case. The general statute providing for the consolidation of library corporations as it existed at the time testator died and the substance of which has been quoted, did not authorize what has been done. Support for the judgment which has been rendered can only be sought for in the act taking effect after the probate of the will and whereby the attempt is made to substitute a new legatee in the place of the one who has been named by the testator.

I now come to the remaining question which arises whether the lapsed legacy intended for the Washington Heights Library falls into the residuum of the third residuary portion which we have been considering and passes under the residuary clause applicable to that portion, to the appellant Knickerbocker Hospital, or whether it becomes property as to which the testator has died intestate and which should pass to his heirs and next

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of kin. In the latter case of course the appellant can gain no advantage from the lapse of the legacy.

It is the familiar rule that a general residuary clause will include and be applicable to lapsed legacies. This rule also governs devises of real estate which fail. So anxious is the law to avoid intestacy that where the language of a residuary clause is ambiguous the courts will give it a broad rather than a restricted interpretation so as to include such legacies. (*Lamb v. Lamb*, 131 N. Y. 227, 234.)

While, however, this is the general rule in respect of residuary clauses it is not the rule in respect of a residuary clause where the legacy which has failed and lapsed was intended to be a disposition of part of the residue. In such a case, on failure of the intended legacy of part of the residuum, the part as to which disposition has failed will go as in case of intestacy and the residuum passing under the residuary clause will not be augmented by a "residue of a residue." The reason for this distinction in most cases is not very apparent, satisfactory or convincing. The one most often given is based on the assumption that it could not have been the intent of the testator in disposing of his residuary estate that a bequest of the residue thereof should be augmented by the lapse of other bequests from such residuum. (2 Redfield on Wills [2d ed.], 118, 119.) While this course of reasoning has some apparent force where the residuum consists of a definite sum or specific property and where it might be assumed that the testator by the residuary clause intended to make a definite bequest, it is difficult to appreciate the force of the reason in such a case as the present one where the residuum to be disposed of consists of a certain portion of an estate of unknown value and where there seems to be no good ground for withholding application to the residuary clause and lapsed legacy of the principles ordinarily covering such

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a situation. However, without attempting to justify this distinction as logical or reasonable in most cases we nevertheless are forced to realize that as the result of inheritance and frequent repetition the rule has become too firmly established to be disregarded. (Redfield on Wills [2d ed.], vol. 2, pp. 117, 119; Thompson on Wills, § 308; *Page v. Leapingwell*, 18 Ves. 463, 465; *Wright v. Weston*, 26 Beav. 429; *Lloyd v. Lloyd*, 4 Beav. 231; *Green v. Pertwee*, 5 Hare's Ch. 249; *Stetson v. Eastman*, 84 Me. 366; *Floyd v. Barker*, 1 Paige, 480, 482; *Beekman v. Bonsor*, 23 N. Y. 298, 312; *Kerr v. Dougherty*, 79 N. Y. 327, 346, 347; *Hard v. Ashley*, 117 N. Y. 606, 616; *Booth v. Baptist Church*, 126 N. Y. 215, 245; *Morton v. Woodbury*, 153 N. Y. 243, 253; *Matter of Hoffman*, 201 N. Y. 247, 254; *Matter of Woolley*, 78 App. Div. 224.) We see no escape from it as applied to the lapsed legacy which we have been considering. Under it, the appellant has no right to the legacy or to object to the receipt of it by the respondent even though the latter is not entitled thereto. The ones to object were the heirs and next of kin of the testator. Apparently they are satisfied; at least they are not here appealing.

We think that the judgment must be affirmed, with costs.

CHASE, COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur; CARDOZO, J., concurs in result.

Judgment affirmed.

MERRITT HULL, Appellant, v. JOHN HULL, JR., Individually and as Executor of JOHN HULL, SR., Deceased, et al., Respondents, Impleaded with Another.

Pleading — assignment of interest in estate — delivery to executor in escrow — complaint alleging that executor wrongfully filed such assignment states cause of action — when failure of assignor to raise question upon judicial settlement a bar to the action — demurrers to such defense and to counter-claims when overruled — plaintiff permitted to withdraw demurrers.

1. The complaint alleges that plaintiff, at the request of a brother who was executor of their father's will, assigned to two other brothers all of his interest in his father's estate upon the understanding and agreement that the assignment was not to have a legal inception until such time as plaintiff should direct a delivery of the same to the assignees; that in violation of such terms, without notice to or knowledge of plaintiff, the executor filed the same together with his final account as executor in Surrogate's Court and claimed that a portion of the payments made by him to the two assignees was made pursuant to the assignment. On demurrer, *held*, that although insufficient to support a charge of fraud or to justify cancellation of the instrument, the pleading states facts sufficient to constitute a cause of action against the executor.

2. Under section 2472a of the Code of Civil Procedure (in effect May 5, 1914), enlarging the jurisdiction of a Surrogate's Court, it was clothed with jurisdiction upon a judicial settlement of the accounts of an executor "to ascertain the title to any legacy or distributive share" and "to exercise all other power legal or equitable necessary to the complete disposition of the matter." Hence, upon the judicial settlement of the accounts of the executor, the plaintiff, having been made a party thereto, was at liberty to file objections to the account presented by the executor and contest the validity of any payments made by him under or by reason of the assignment in question and to assert title in himself to the legacy and to have the question of title to the same determined in that proceeding, and where he omitted to assert his legal rights upon such settlement, the decree of the Surrogate's Court thereon is conclusive evidence against him that the items allowed to the executor for moneys paid to legatees were correct and a defense setting up the decree made on the judicial settlement

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is sufficient to constitute a bar to the maintenance of this action. A demurrer to such defense, therefore, was properly overruled, but as the complaint states a cause of action on contract against the executor, the plaintiff should be permitted to withdraw his demurrer.

3. A demurrer to separate defenses set up in the answer of the defendant executor alleging counterclaims against the plaintiff in favor of said defendant was properly overruled. The complaint alleged a contractual relationship between the plaintiff and said defendant, and a breach thereof by the latter. The counterclaim stated a cause of action on contract existing at the commencement of the action. It was error, however, to grant judgment in favor of such defendant for the amount of the counterclaims. The only question presented by the demurrer was whether or not the counterclaims were properly alleged as such and of the character specified in section 501 of the Code of Civil Procedure.

4. A demurrer to a separate defense contained in the answer of one of defendant assignees which stated not only a cause of action arising out of the transaction set forth in the complaint and connected with the subject-matter of the action, but likewise a cause of action upon contract existing at the commencement of the action, was properly overruled but though the complaint fails to state a cause of action against said defendant, the court was in error in dismissing the complaint as against him and awarding him final judgment on the counterclaim, as he was not at liberty to challenge the sufficiency of the same on the argument of that demurrer.

Hull v. Hull, 172 App. Div. 287, modified.

(Argued November 14, 1918; decided January 21, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 8, 1916, affirming a final judgment of Special Term which dismissed the complaint on the merits as to each of the respondents, overruled a demurrer to a separate defense contained in the answer of John Hull, Jr., interposed by plaintiff upon the ground of insufficiency thereof as a defense, and a further demurrer to two additional separate defenses and counterclaims in the same answer, and awarding to John Hull, Jr., affirmative judgment on the counterclaims. Also, overruling demurrer interposed by plaintiff to a separate defense and

counterclaim set out in the answer of the defendant Frank Hull, and awarding said defendant affirmative judgment for the amount of the counterclaim.

The substance of the several pleadings together with the facts, so far as material, appear in the opinion.

Thomas B. Merchant for appellant. The complaint states a cause of action in equity. (*Stiebel v. Grosburg*, 202 N. Y. 266; *Murtha v. Curley*, 90 N. Y. 372; *Seely v. Seely*, 164 App. Div. 650; *McHenry v. Hazard*, 45 N. Y. 580; *Dederer v. Voorhies*, 81 N. Y. 153; *Ward v. Town of Southfield*, 102 N. Y. 287; *Becker v. Church*, 115 N. Y. 562; *Mayor v. Brady*, 115 N. Y. 599; *Kley v. Healy*, 127 N. Y. 555; *Stevens v. C. N. Bank*, 144 N. Y. 50; *Warren v. Union Bank*, 157 N. Y. 259.) The defense in paragraph 3 of the answer of John Hull, Jr., is insufficient in law upon the face thereof. (*Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; *People ex rel. McEnroe v. Wells*, 89 App. Div. 89; *Matter of Schnabel*, 202 N. Y. 134; *Matter of Farley*, 91 Misc. Rep. 185.) The counterclaims in the separate answers of the respondents are not, and neither of them is, of the character specified in section 501 of the Code of Civil Procedure. (*Morris v. Windsor Trust Co.*, 213 N. Y. 27; *Fulton Co. G. & E. Co. v. Hudson Riv. T. Co.*, 200 N. Y. 287; *Britton v. Ferrin*, 171 N. Y. 235; *Dinan v. Coneys*, 143 N. Y. 544; *Rothschild v. Whitman*, 132 N. Y. 472; *People v. Dennison*, 84 N. Y. 272; *Sugden v. Magnolia Metal Co.*, 58 App. Div. 236; 171 N. Y. 697.)

Leon C. Rhodes for John Hull, Jr., individually and as executor, respondent. The complaint fails to state a cause of action in equity. (*Day v. Sizer*, Clarke, 136; *Hutchinson v. Brown*, Clarke, 408; *DeMillt v. Hill*, 89 Hun, 56; *Long v. Warren*, 68 N. Y. 426; *Redmond v. Tone*, 32 N. Y. S. R. 260; *Harlow v. La Brum*, 82 Hun,

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292; 151 N. Y. 278; *Butler v. Viele*, 44 Barb. 166; *Lawrence v. Foxwell*, 17 J. & S. 273; 4 Civ. Pro. Rep. 340; *Wood v. Amory*, 105 N. Y. 278; *Lynch v. Dowling*, 1 City Ct. Rep. 163; *Francis v. N. Y. & B. El. Ry. Co.*, 17 Abb. [N. C.] 1; *Construction Reporter Co. v. Crowinshield*, 16 Misc. Rep. 381.) The complaint fails to state facts sufficient to constitute a cause of action at law against the defendant John Hull, Jr. (*Gilbert v. Taylor*, 148 N. Y. 298; *Sharp v. Rose*, 49 N. Y. S. R. 420; 139 N. Y. 652; *Chapman v. Forbes*, 123 N. Y. 532; *Beers v. Strong*, 128 App. Div. 20; *Conkling v. Weatherwax*, 90 App. Div. 585.) The defense contained in paragraph 3 of the answer of the defendant John Hull, Jr., is sufficient in law upon the face thereof. (*Smith v. Smith*, 79 N. Y. 634; *Patrick v. Shaffer*, 94 N. Y. 423; *Jordan v. Van Epps*, 85 N. Y. 427; *Matter of Randall*, 152 N. Y. 508; *Matter of Dollard*, 74 Misc. Rep. 312; 149 App. Div. 926; *Matter of Carey*, 77 Misc. Rep. 602; *Matter of Higgins*, 81 Misc. Rep. 579; *Matter of Delgado*, 79 Misc. Rep. 590; *Matter of Clyne*, 72 Misc. Rep. 593.) The counterclaims contained in paragraphs 7 and 8 of the answer of the defendant, John Hull, Jr., are sufficient in law and of the character specified in section 501 of the Code. (*Strough v. Bd. of Supervisors*, 119 N. Y. 212; *Roberts v. Ely*, 113 N. Y. 128; *Ross v. Curtiss*, 30 Barb. 238; 31 N. Y. 606; *Sage v. Culver*, 147 N. Y. 241; *Zebley v. F. L. & T. Co.*, 139 N. Y. 461.)

Harry C. Walker for Frank Hull, respondent. The counterclaim contained in paragraph 6 of the answer of defendant Frank Hull, is sufficient. (*Carpenter v. M. L. Ins. Co.*, 93 N. Y. 552; *Strough v. Board of Supervisors*, 119 N. Y. 212; *Roberts v. Ely*, 113 N. Y. 128; *Chapman v. Forbes*, 123 N. Y. 532; Code Civ. Pro. §§ 501, 509; *Sadlier v. City of New York*, 185 N. Y. 408; *Coatsworth v. L. V. R. R. Co.*, 156 N. Y. 451.)

HOGAN, J. The complaint alleges that plaintiff and the defendants are brothers, sons of John Hull, Sr., who died June 25th, 1897, leaving a last will which was duly admitted to probate, the issuance of letters testamentary thereon to defendant John Hull, Jr., the executor named therein, who duly qualified. That under the terms of said will plaintiff was given a residuary interest of one-seventh in said estate which amounts to more than \$1,478.25, no part of which has been paid; that on August 18, 1899, plaintiff at the request of John Hull, Jr., executed, acknowledged and delivered to the latter an assignment, under seal (set out at length in the complaint), which in effect recites that for a valuable consideration paid plaintiff by James Hull and Frank Hull, plaintiff assigned to them all right, title and interest he had in the estate of John Hull, Sr., as legatee or otherwise and authorized the assignees to execute and deliver all vouchers, receipts, etc., in satisfaction thereof. That defendant John Hull, Jr., fraudulently represented to plaintiff that it would be for plaintiff's interest to execute and deliver said assignment, and promised to hold the same in escrow until plaintiff authorized a delivery thereof and in reliance upon such representations the assignment was delivered. That plaintiff never authorized a delivery of the assignment and same was never delivered; that the assignment was without consideration. That James Hull and Frank Hull, defendants, never requested or authorized John Hull, Jr., to procure such assignment for them or either of them. That defendants James and Frank Hull were likewise residuary legatees under the will of their father equally with plaintiff; that defendant John Hull, Jr., as executor has paid to James and Frank Hull the sum of \$2,295.58 and \$2,398.75 respectively or upwards. That on or about April 13, 1914, without the knowledge or consent of plaintiff, defendant John Hull, Jr., filed his account as executor, together with

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the assignment in Surrogate's Court and in his account set forth that a portion of the payments therein made to James and Frank were made pursuant to said assignment; that the sums so paid to them exceeded the amount to which they were entitled under the will and upon such accounting the executor was surcharged for excess payments. That under said assignment defendant John Hull, Jr., claims he paid to James and Frank the sum of \$1,478.25, being part of the money to which plaintiff is entitled. The demand for judgment was for a cancellation of the assignment; judgment against John Hull, Jr., for \$1,478.25 with interest and in the event of failure to collect the amount of same from him, judgment against the defendants James Hull and Frank Hull for the same amount.

The defendant John Hull, Jr., denied the material allegations of the complaint, save the relationship of the parties, death of John Hull, Sr., probate of his will, etc.

For a third separate defense John Hull, Jr., alleged that on May 5th, 1914, as executor, etc., of the will of John Hull, Sr., he filed his final account as executor in the Surrogate's Court together with a petition duly verified praying that his accounts as executor be judicially settled and for his discharge; that a citation was duly issued thereon directed to the plaintiff amongst others, which was personally served on plaintiff; that plaintiff at all times between the date and delivery of the assignment set out in the complaint, August 18th, 1899, and the accounting of defendant as executor and the decree of the Surrogate's Court entered thereon, had actual knowledge of the delivery of the assignment to and reliance of all of the defendants thereon and of the payment made by him as executor pursuant to said assignment to the other defendants of the legacy to plaintiff under the will of his father. The making and entry of a decree of the Surrogate's Court ratifying and

confirming his accounts as executor and the payments made by him to James and Frank Hull pursuant to said assignment, which facts appeared and were adjudicated on said accounting. That no appeal was taken from the decree entered upon said accounting and the same remains in full force and is a bar to the maintenance of this action.

To that separate defense designated as the third separate defense, plaintiff interposed a demurrer upon the ground that it was insufficient as a defense.

Two additional separate defenses were set forth in the answer of John Hull, Jr., designated as seventh-eighth.

The seventh separate defense alleged in substance that plaintiff was elected to the office of highway commissioner in 1902; that John Hull, Jr., was surety on his bond; that plaintiff converted and embezzled funds of the town in his custody as highway commissioner which defendant John Hull, Jr., was compelled to, and did, pay to the town, viz., \$240.16 on January 1, 1905, no part of which has been paid to him by plaintiff and by reason thereof there is due from plaintiff to defendant John Hull, Jr., \$240.16 and interest. For an eighth separate defense that he, John Hull, Jr., was an accommodation indorser and guarantor upon a certain promissory note for \$438.00 dated October 24, 1904, made by plaintiff which note was transferred to the City National Bank of Binghamton before maturity; that defendant John Hull, Jr., was compelled to and did on January 24, 1905, pay on account thereof the sum of \$443.57 and there is due to him from plaintiff \$228.56 and interest thereon from January 26, 1905, which sum and the amount set out in the seventh separate defense he sought to counterclaim against plaintiff. To the seventh and eighth separate defenses the plaintiff demurred upon the grounds (1) that as a defense it is insufficient in law upon the face thereof, (2) that as a counterclaim it appears

on the face thereof (a) that it is not of the character specified in section 501 of the Code of Civil Procedure and (b) that it does not state facts sufficient to constitute a cause of action.

Referring to the pleadings as to the defendant Frank Hull, the defense of former adjudication was pleaded as a separate defense in the answer of the defendant Frank Hull substantially in the form of the third separate defense pleaded in the answer of John Hull, Jr.

For a sixth defense and counterclaim defendant Frank Hull alleged in substance that in the year 1894 the plaintiff together with Frank and James Hull were equal partners in business and continued as such until August, 1899, when the partnership was dissolved; that an account was taken and stated between the parties at that time, which disclosed that plaintiff had withdrawn from the business a sum largely in excess of the amount drawn by the remaining partners: thereupon the plaintiff withdrew from the partnership and in partial payment of the amount due from him to James Hull and Frank Hull executed and delivered to James Hull and Frank Hull an instrument in writing dated August 18th, 1899, whereby he did transfer and deliver all of his right, title and interest in and to the partnership property and assets of the firm, and in and to any balance which might otherwise be payable to him when all of the partnership business and assets should be finally collected, and also duly made, executed and delivered to them an assignment of his interest in the estate of his father which assignment is set forth in the complaint. That by reason of said assignment the defendant Frank Hull received from the proceeds of the business \$2,500 and from the estate of John Hull, Sr., \$739.12, leaving a balance due him from plaintiff of \$97.59 for which amount he demanded judgment as upon counterclaim.

The demurrer interposed by plaintiff to the answer

of defendant Frank Hull was limited to the sixth defense and counterclaim above referred to and the grounds thereof were, insufficiency in law on the face thereof; that as a counterclaim it is not of the character specified in section 501 of the Code of Civil Procedure and fails to state facts sufficient to constitute a cause of action.

The issues raised by the several demurrers were brought on for trial at the same time, and resulted in one order which recites "and the attorneys for said defendants having interposed the objection to the plaintiff's complaint herein that the plaintiff has an adequate remedy at law; that this court as a court of equity will not assume jurisdiction of said action and, therefore, has not jurisdiction of the subject thereof and that plaintiff is not entitled to maintain said action in equity for the relief demanded in said complaint, and that said complaint does not state facts sufficient to constitute a cause of action." Then follow conclusions, "That the said complaint fails to state facts sufficient to constitute a cause of action;" that each demurrer should be overruled, "and plaintiff not asking for or desiring leave to plead over and the counterclaims demurred to being thereby admitted," final judgment for each defendant dismissing the complaint upon the merits and for affirmative judgment for each defendant for the amount of his counterclaim was ordered.

The defendant James Hull did not appear or answer.

Upon the argument of the demurrer to the third separate defense in the answer of the defendant John Hull, Jr., upon the ground of insufficiency said defendant was privileged to and did attack the sufficiency of the complaint under the familiar rule that such a demurrer searches the record for the first fault in pleading and reaches back to condemn the first pleading defective in substance. We are in accord with the conclusion of the courts below that the allegations contained in the com-

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plaint were insufficient to support a charge of fraud or to justify a cancellation of the assignment.

Eliminating from the complaint the allegations of fraudulent representations and reliance of plaintiff thereon, the pleading though inartificially framed does state facts sufficient to constitute a cause of action against John Hull, Jr. The assignment executed by plaintiff, a copy of which is set out in the complaint, is absolute upon the face of same and transfers to the assignees therein named all interest of the plaintiff in the estate of his father, stated as of the value of upwards of \$1,400. The complaint alleges that plaintiff retained dominion over the instrument; that the assignment was not to have a legal inception until such time as he should direct a delivery of the same to the assignees; that the defendant undertook to act as a depository of the instrument and accepted the same subject to the restrictions and conditions imposed by plaintiff, and in violation of the terms under which he held such instrument, and as we construe the pleading without notice to or knowledge of plaintiff, filed the same together with his final account as executor in Surrogate's Court, and in his final account claimed that a portion of payments made by him to James and Frank Hull were made pursuant to assignment, thereby in substance alleging that as legatee under the will of his father the title to such legacy was in him and that defendant was required to respond to him for the amount of such legacy, by reason of violation of the agreement under which such assignment was held by defendant.

As bearing upon the sufficiency of the third separate defense in the answer of John Hull, Jr., it is essential to consider the jurisdiction of a Surrogate's Court upon a judicial settlement of the accounts of an executor and the effect of the decree made upon such judicial settlement.

In *Matter of Randall* (152 N. Y. 508) this court held that upon an accounting in Surrogate's Court where the

same distributive share of an estate is claimed by two persons, one by original title and the other by an assignment apparently valid, resort must be had to a court of equity to determine the validity of the assignment as the Surrogate's Court was clothed with such jurisdiction only as was especially conferred upon it by statute, or necessarily implied from the power conferred, and the statute as it stood at that time having failed to confer power essential to determine the validity of such assignment the sole remedy to obtain the relief was by resort to a court possessing general equity powers and jurisdiction. In the opinion in that case various provisions of the Code applicable to the question were considered in detail, a repetition whereof is unnecessary here.

In 1910 the legislature added a new section to the Code of Civil Procedure (Section 2472a) which was in force at the time of the proceeding in the Surrogate's Court and the entry of the decree set out in the third separate defense to which the demurrer was served. The section read: "The surrogate's court has also jurisdiction upon a judicial accounting or a proceeding for the payment of a legacy to ascertain the title to any legacy or distributive share, to set off a debt against the same and for that purpose ascertain whether the debt exists, to affect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter. He must order the trial of any controverted question of fact of which either party has constitutional right of trial by jury and seasonably demands the same." (Section 2510, Code, in a modified form in effect September 1st, 1914.)

Indisputably section 2472a of the Code enlarged the jurisdiction of a Surrogate's Court as it existed prior to the enactment of that section and clothed such court with jurisdiction upon a judicial settlement of the accounts of an executor "to ascertain the title to any legacy or

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distributive share" or "to exercise all other power legal or equitable necessary to the complete disposition of the matter," a power not theretofore conferred as determined in *Matter of Randall*.

Upon the judicial settlement of the accounts of John Hull, Jr., as executor, the plaintiff under the provisions of the Code then in force, was a necessary and proper party to the accounting. (Code Civil Proc. sec. 2728.) Having been made a party thereto he was at liberty to file objections to the account presented by the executor and contest the validity of any payments made by the executor to James and Frank Hull under or by reason of the assignment in question, to assert a non-delivery of said instrument to them or an unauthorized possession of said instrument by any of the defendants as evidence of title to the legacy bequeathed to him under the will of his father; to assert title in himself to the legacy and to have the question of title to the same determined in said proceeding. Plaintiff omitted to assert his legal rights upon the judicial settlement and the decree of the Surrogate's Court upon such judicial settlement is conclusive evidence against him that the items allowed to the executor for moneys paid to legatees were correct. (Code Civil Proc. sec. 2742.)

The conclusive effect of the decree made on the judicial settlement was set out in the answer as a bar to the maintenance of this action.

To sustain a plea of a former judgment in bar of a second action it must appear that the cause of action in both suits is the same or that some fact essential to the maintenance of the second action was in issue and determined in the first action adversely to claimant. In the application of that principle consideration must be given to a further rule of law that a judgment is final and conclusive upon all matters which might have been

litigated and decided in the action and as to matters which might have been urged as a defense in that action. Under the complaint in this action, briefly stated, the plaintiff would be required to establish a delivery of the assignment to John Hull, Jr., upon the conditions alleged by him, the use of the assignment as a voucher in Surrogate's Court and payment of his legacy to the other defendants thereunder, and upon such facts would assert that title to the legacy being in him, the liability of the defendant was established in his favor.

The proceeding for a judicial settlement in the Surrogate's Court was instituted by a petition accompanied by an account of the executor which disclosed payments made by him to James and Frank Hull, including the bequest made to plaintiff for all of which he claimed credit. To justify an allowance of payment to James and Frank Hull of the plaintiff's legacy, it was essential for the defendant executor to establish title in James and Frank to such legacy and payment of same to them. Such proof was supplied by the assignment and the voucher for payment signed by James and Frank. I have hereinbefore called attention to the rights of the plaintiff to controvert such facts upon the judicial settlement and the jurisdiction of the Surrogate's Court to determine as between plaintiff and James and Frank Hull, as well as defendant executor the title to the legacy now claimed by plaintiff in this action. Applying the rules of law above stated to the facts in this case the conclusion follows that the facts upon which plaintiff must rely to recover under the complaint in this action were material and essential to a determination of the issue involved upon the judicial settlement in the Surrogate's Court. Every fact stated in the complaint was admissible on the question of title to plaintiff's legacy upon the judicial settlement of the accounts of the executor in that court. Plaintiff cannot now retry that issue.

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The allegations contained in the third separate defense were sufficient as a defense and constitute a bar to the maintenance of this action.

In view of our determination that the complaint states facts sufficient to constitute a cause of action, a question arises as to that part of the decision of the Special Term upon the trial of the demurrer in so far as it directed a dismissal of the complaint. A reference to what has been written as to the sufficiency of the complaint will disclose that the views expressed are confined solely to the question as to whether or not the complaint as the first pleading was defective in substance and, therefore, is inapplicable to the question about to be considered.

The demurrer to the defense set forth in the answer was upon the ground that it was insufficient in law upon the face thereof. (Code Civil Proc. sec. 494.) By that pleading the plaintiff admitted the facts alleged in the third separate defense and challenged the sufficiency of the same as matter of law.

The issue of law thus presented came on for trial at Special Term as a contested motion. (Code Civil Proc. secs. 969, 976.) Upon the trial of the demurrer the court was required to make a decision which should direct the final or interlocutory judgment to be entered thereon. (Code Civil Proc. secs. 1021, 497.) The court announced its conclusion that the demurrer should be overruled and plaintiff be afforded an opportunity to amend or plead anew. The plaintiff asserted that he did not desire to plead anew or amend, and thereby elected to stand upon his demurrer. The formal decision of the court was thereafter entered and the demurrer allowed to stand as a pleading in the case. Under the determination of the Special Term and the decision made the only judgment remaining to be directed was a final judgment overruling the demurrer and dismissing the complaint. (*National Contracting Co. v. Hudson R. W. P. Co.*, 110

App. Div. 133; *Peters v. Needham P. & O. Co.*, 124 App. Div. 749; *Thistle v. Jones*, 123 App. Div. 40.)

In view of our conclusion that the complaint does state a cause of action on contract against John Hull, Jr., we may permit plaintiff to withdraw his demurrer to the third separate defense.

The plaintiff also demurred to the seventh and eighth separate defenses set out in the answer of John Hull, Jr., both of which defenses alleged counterclaims against plaintiff in favor of said defendant, one based upon an amount paid by him by reason of his liability as surety upon an official bond in which plaintiff was the principal; the second, upon a promissory note made by plaintiff upon which defendant was an indorser and as such was obliged and did pay the amount of said note.

To each of said defenses the plaintiff demurred upon the grounds (1) that as a defense it is insufficient in law upon the face thereof; (2) that as a counterclaim it appears on the face thereof (a) that it is not of the character specified in section 501 of the Code of Civil Procedure, and (b) that it does not state facts sufficient to constitute a cause of action. The Special Term overruled the demurrer and plaintiff declined to amend. The decision of the court directed that the complaint be dismissed and judgment be entered in favor of defendant for the amount of the counterclaim.

The conclusion of the Special Term that the demurrer be overruled was proper. The complaint as construed by us alleged a contractual relationship between the plaintiff and defendant, John Hull, Jr., and a breach thereof by the latter. The counterclaim set up in defendant's answer stated a cause of action on contract existing at the commencement of the action. We conclude, however, that it was error to grant judgment in favor of John Hull, Jr., for the amount of the counterclaims. The only question presented by the demurrer was whether

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or not the counterclaims were properly alleged as such and of the character specified in section 501 of the Code of Civil Procedure. (*Fulton County Gas & E. Co. v. Hudson R. Tel. Co.*, 200 N. Y. 287.)

The defense of former adjudication was also pleaded as a separate defense in the answer of Frank Hull, substantially in the form of the same separate defense pleaded in the answer of John Hull, Jr. The demurrer served by plaintiff to the answer of Frank Hull was limited to the sixth defense and counterclaim set out therein, which stated not only a cause of action arising out of the transaction set forth in the complaint and connected with the subject-matter of the action, but likewise a cause of action upon contract existing at the commencement of the action. The demurrer was, therefore, properly overruled and though the complaint under our construction of the same fails to state a cause of action against Frank Hull, the court was in error in dismissing the complaint as against him, as he was not at liberty to challenge the sufficiency of the same on the argument of that demurrer and awarding him final judgment upon the counterclaim.

The judgment appealed from should be modified by striking therefrom all of the last paragraph thereof commencing with the words, "Ordered and adjudged," and by inserting in the place thereof the following:

Ordered and adjudged that the demurrer to the third separate defense in the answer of defendant, John Hull, Jr., be overruled and the complaint as to him be dismissed on the merits, with costs in all courts to be taxed, unless within twenty days plaintiff shall by stipulation duly filed and served withdraw the demurrer and pay to said defendant the costs taxed on the argument of said demurrer, together with costs in the Appellate Division and this court, in which event the complaint shall be allowed to stand.

That the demurrer to the seventh and eighth defenses and counterclaims in the answer of John Hull, Jr., be overruled, without costs, with leave to plaintiff to withdraw said demurrer to said counterclaims and defenses and serve a reply thereto within twenty days upon payment of ten dollars costs; and be it further

Ordered and adjudged, that the demurrer to the sixth separate defense and counterclaim in the answer of the defendant, Frank Hull, be overruled, with costs in all courts; with leave upon payment of said costs within twenty days to withdraw said demurrer and serve a reply; and be it further ordered and adjudged that the judgments below be modified accordingly and as modified affirmed.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, McLAUGHLIN and CRANE, JJ., concur.

Judgment accordingly.

LAURA N. SMITH, Appellant, v. EDWARD W. BROWNING,
Respondent.

Tax Law — transfer tax is a lien upon appraised value of each interest bequeathed, not upon gross amount of several bequests to any one individual — devise of real estate not subject to lien for transfer tax upon bequest of personal property to devisee.

1. Under section 224 of the Tax Law (Cons. Laws, ch. 60) the basis of the transfer tax is not upon the gross amount of several bequests to one individual, but rather upon the appraised value of the separate interests into which the estate is divided, and the lien imposed is limited to such separate interest.

2. Plaintiff and defendant entered into a contract for a sale and purchase of real estate, the plaintiff to convey and defendant to acquire said premises free and clear of all liens or charges except an outstanding mortgage thereon. On the due day defendant refused to accept the deed of said premises tendered by the plaintiff upon the sole ground that plaintiff's title was unmarketable by reason of the

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fact that the transfer tax upon plaintiff's interest in her deceased husband's estate had not then been computed and paid and that said tax was an existing lien thereon. Plaintiff thereafter brought this action to compel a specific performance of the contract. *Held*, that the transfer tax was not a lien on the specific property contracted for, but that owing to the delay of plaintiff in obtaining an appraisal of the estate and in view of the fact that she did not avail herself of the practice of obtaining a consent and release of the property in question pending the appraisal, the defendant had no means of ascertaining how much or how little tax was chargeable on the premises. He was entitled to receive a marketable title free from any transfer tax and was not required under the terms of his contract with plaintiff to speculate with reference thereto. In the exercise of reasonable care plaintiff could have given a marketable title to the premises on the due day. Her failure in that respect cannot be attributed to defendant; hence she cannot enforce specific performance against him.

Smith v. Browning, 171 App. Div. 278, affirmed.

(Argued December 3, 1918; decided January 21, 1919.)

APPEAL from a judgment entered March 22, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Thomas Smith and *Frank A. Gaynor* for appellant. The trial court was right in deciding that the premises were not subject to a lien for the transfer tax on the other devises and legacies. (*Matter of Swift*, 137 N. Y. 77; *Matter of Penfold*, 216 N. Y. 163; *Brown v. Lawrence Park Realty Co.*, 133 App. Div. 753; *Ross on Inheritance Taxation*, 4, § 4; 278, § 217; *Matter of Title Guarantee & Trust Co.*, 159 App. Div. 803; 212 N. Y. 51; *Matter of Alexander*, 172 App. Div. 895; *McElroy on Transfer Tax Law* [2d ed.], 43; *Matter of Will of Vassar*, 127 N. Y.

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1; *Matter of Enton*, 113 N. Y. 174; *Matter of Kimberly*, 29 App. Div. 470; *McLaughlin v. Miller*, 124 N. Y. 510; *Winne v. Reynolds*, 6 Paige, 407.)

Thomas G. Prioleau for respondent. The tax on the property bequeathed and devised to the plaintiff by the will of her deceased husband was a lien upon all of the property so transferred and was payable therefrom; the title, therefore, tendered by the plaintiff, at the time set for the closing, was unmarketable and not in accordance with the terms of the contract. (*Matter of Cummings*, 142 App. Div. 377; *Matter of Penfold*, 216 N. Y. 163.) The defendant, by the terms of his contract, was entitled to a marketable title, free from reasonable doubt. (*C. P. Assn. v. Gouraud*, 224 N. Y. 343; *Brokaw v. Duffy*, 165 N. Y. 391; *Acme Realty Co. v. Schinasi*, 215 N. Y. 495.)

HOGAN, J. On January 4th, 1914, the last will and testament of one George J. Smith was admitted to probate by the surrogate of Ulster county. The plaintiff is the widow of George J. Smith and under the terms of the will was named as beneficiary in three several paragraphs thereof (1) a legacy of two hundred thousand dollars; (2) certain real estate known as No. 43 West Seventy-second street, New York city, also real estate including contents of house thereon situated in Ulster county; (3) a life interest in the residuary estate.

April 15th, 1914, plaintiff and defendant entered into a contract for a sale and purchase of the real estate located on West Seventy-second street in the city of New York, the plaintiff to convey and defendant to acquire said premises on May 2d, 1914, thereafter extended to May 13th, 1914, free and clear of all liens or charges except an outstanding mortgage thereon.

On May 13th, 1914, the due day, defendant refused

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to accept the deed of said premises tendered by the plaintiff upon the sole ground that plaintiff's title was unmarketable by reason of the fact that the transfer tax upon plaintiff's interest in her deceased husband's estate had not then been computed and paid, and that said tax was an existing lien thereon. Plaintiff thereafter and on or about July 23d, 1914, brought this action to compel a specific performance of the contract. The justice at Special Term found as matter of fact that after the commencement of this action, but before the trial thereof, the estate of George J. Smith was duly appraised and the collateral inheritance tax upon plaintiff's interest therein paid in full; that proceedings for an appraisal were commenced on June 4th, 1914, and the tax paid February 12th, 1915. That subsequent to May 13th, 1914, when title was rejected by defendant, in the appraisal proceeding, the premises No. 43 West Seventy-second street, New York, were held to be of nominal value and formed no basis for the computation of said tax, and as conclusion of law that plaintiff on May 13th, 1914, was seized of a good and marketable title to said premises, able and willing to perform and carry out the contract and tendered due performance thereof. That the premises were at no time subject to the lien of any collateral inheritance tax upon the estate of George J. Smith or upon the interest of plaintiff in said estate; that the inheritance tax upon the property other than the premises on West Seventy-second street received by plaintiff under the will representing actual value of upwards of \$220,000, did not constitute a lien upon the premises on West Seventy-second street and awarded judgment in favor of the plaintiff.

The Appellate Division reversed certain enumerated findings of fact and all conclusions of law made by the trial justice, made new conclusions of law in substance as follows: That on May 13th, 1914, the due day,

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plaintiff was not seized of a good and marketable title to the premises on West Seventy-second street in that the transfer tax upon the estate devised to her of which said property was a part had not been fixed or paid. That at said time the premises were subject to a lien of the inheritance tax upon that portion of the estate to which she was entitled under the will of her husband. That the collateral inheritance tax upon the property other than the premises on West Seventy-second street received by plaintiff under the will of her husband representing actual value of upwards of \$220,000 constituted a lien upon the said premises on West Seventy-second street. That the fact that said tax had not been computed or paid on May 13th, 1914, rendered the title unmarketable and was a sufficient excuse by defendant to refuse to take title, and thereupon reversed the judgment of the Special Term, dismissed the complaint and directed judgment in favor of defendant for \$250 deposit on contract, \$124 expended on examination of title, total \$374, and costs.

Section 224 of the Tax Law (Cons. Laws, ch. 60), so far as material to the question presented upon this appeal, is as follows:

“Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors * * * of every estate so transferred shall be personally liable for such tax until its payment. * * * Any such executor * * * having in charge * * * any legacy * * * subject to such tax shall deduct the tax therefrom and shall pay over the same to the state comptroller or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property

subject to tax under this article to any person until he shall have collected the tax thereon * * *."

In seeking an interpretation of the section above quoted, the phraseology of which is somewhat obscure, we may consider the nature and object of the statute imposing a tax, the statute as it existed prior to the enactment of section 224, as it reads at the present time, and to what we believe to have been the purpose of the legislature in an enactment of the same. As has been frequently adjudicated, the transfer tax is not a tax upon property but upon the right of succession to property. The tax imposed is one in the nature of a special tax affecting a special class; therefore, all doubt as to construction of any provision of the statute must be resolved in favor of the person chargeable with payment of the tax.

The purpose of the statute, which at the time of the enactment of the same was an innovation in the laws relating to taxation in this state, was to provide revenue for the state. The first statute providing for a transfer tax was enacted in 1885 (Chapter 483). The substance of several provisions of the present section 224, material to be considered in this case, was embodied in the original law, viz., the personal liability of the executor for the tax (section 1); the tax on an income from a trust estate was made a lien thereon until paid (section 2); the provisions requiring the executor to deduct the tax from any legacies, or if the legacy be not in money to collect the tax thereon from the legatee entitled thereto, and as to the delivery of any specific legacy or property to a legatee until he shall have paid the tax thereon, were included in the statute.

That the enactment of the original Transfer Tax Law resulted in numerous and prolonged litigations is a matter of common knowledge. The constitutionality of the law was questioned upon several grounds. Various

provisions of the law were subjects of interpretation by the courts. Of necessity the collection of taxes under the statute was long postponed and the state deprived of revenue under the statute in expectation of which appropriations of moneys for state purposes had been made by the legislature. Obviously the legislature by reason of the enumerated, as well as other, causes which might readily be suggested, deemed it essential that adequate provision to insure collection of the transfer tax and safeguard the interests of the state against loss by reason of delay without the imposition of unjust or unreasonable hardships upon the individual responsible for the payments of the tax should be enacted. The statute of 1885 had been amended between the time of its enactment and the year 1892, and the legislature in the latter year codified the statutes and together with certain additional amendments enacted chapter 399 of the laws of that year. By section 5 of that statute the provisions of the act of 1885, to which attention has been called, were continued. By section 3 of the law the substance of the first sentence of the present section 224 was enacted, viz.: "Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred * * * shall be personally liable for such tax until its payment." In seeking an interpretation of that sentence we must read the language quoted in connection with the remaining provisions contained in the section. Section 224 provides: "If such legacy * * * be not in money, he (the executor) shall collect the tax thereon upon the appraisal value thereof from the person entitled thereto." Under the fourth clause of the will of Mr. Smith the devise and bequest to plaintiff was the house and lot on West Seventy-second street, New York, real estate and contents of dwelling house thereon in Kingston, Ulster county. That legacy clearly was

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one "not in money." In the sentence quoted from section 224 will be found the words "thereon" and "thereto" and "thereof" to which effect must be given. The executor is required to collect the tax *thereon* upon the appraisal value *thereof*, that is to collect the tax on the same — the tax on that particular legacy which was one "not in money." The amount of the tax the executor is required to collect *thereon* is determinable by the appraised value "*thereof*," not the appraised value of all property passing under the will to one beneficiary but the value "*thereof*," to wit, of the bequest "not in money." Had the plaintiff paid to the executor the tax on that particular legacy upon the appraised value *thereof* the personal liability of the beneficiary and the executor for that amount of the tax would have terminated save as to the duty of the executor to pay over the tax to the proper officer. To construe the clause of the section and determine that the inheritance tax upon the legacy to plaintiff of \$200,000, under a separate clause of the will is a lien upon a legacy "not in money" upon which the executor has collected the tax would require us to ignore the specific language of the statute and read into the same a clause extending such lien in direct conflict with the expressed words of the law and impose upon a beneficiary an injustice not contemplated by the legislature.

As to the separate legacy of \$200,000, the statute requires the executor to deduct the tax "*therefrom*," that is, from such legacy. The executor is not directed to deduct from that money legacy the tax on the legacy "not in money." The legacy for \$200,000 was in charge of the executor. He was personally liable as was the beneficiary for the payment of the inheritance tax *thereon*. The executor being required to deduct the amount of the tax from such legacy, the state was amply protected from loss of the tax payable on that legacy

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as in the case of the legacy "not in money." Had it been the intention of the legislature to extend the lien as determined below it would not have prescribed different methods for the collection of a tax upon separate classes of bequests, but would have made clear its intention in unmistakable language. This conclusion is fortified by a further provision of the statute. "He (the executor) shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon." As will be observed, we find repeated the words "*the tax thereon*" which under the application heretofore made should be construed as the tax on that particular specific legacy. The fair implication under the sentence quoted, is that upon payment of the tax upon a specific legacy the beneficiary is entitled to the possession of the money or property specifically bequeathed, and in the event of a refusal of the executor to deliver the same, he may be compelled to do so. Under the decision of the Appellate Division in this case a specific legacy though the tax thereon had been paid would continue burdened by a lien for all other taxes assessed against the beneficiary. I do not concur in such interpretation of the statute. Under section 224 of the statute the basis of the tax is not upon the gross amount of several bequests to one individual, but rather upon the appraised value of the separate interests into which the estate is divided, and the lien imposed is limited to such separate interest. The method of computation of the tax for determining exemptions and rate of tax does not interfere with such interpretation. Under the statute the entire estate must be appraised. Such appraisal discloses the value of the entire estate as well as of each item of property bequeathed; therefore, apprehension of difficulty in application of the rule stated is not more likely to arise than would exist in case of renunciation of one of

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several legacies to a beneficiary made subsequent to an appraisal.

The conclusion of the Appellate Division that the collateral inheritance tax upon the property other than the premises on West Seventy-second street, received by plaintiff under the will of her deceased husband representing actual value of upwards of \$220,000 constituted a lien upon the West Seventy-second street premises, is in conflict with our construction of the law. While we are at variance with the decision of the Appellate Division in a construction of the statute and in the absence of an opinion in that court might have affirmed the judgment without opinion, the statement made by counsel that the opinion below was the first determination made upon the question presented, necessitates pronouncement of our views of the statute for the guidance of officers charged with enforcement of the law as well as beneficiaries by will or under the intestate laws.

We conclude, however, that the judgment should be affirmed. The Transfer Tax Law requires an appraisal of the property of a deceased as of the date of death and a determination of the amount of the tax payable thereunder. Such appraisal and determination might have been made at any time subsequent to the probate of the will January 4th, 1914, and even before claims against the estate had been ascertained. Until an appraisal was made no record existed disclosing the value of the property on West Seventy-second street for the purpose of determining the amount of any of the tax thereon. Upwards of four months elapsed between the probate of the will and the due day under the contract of sale and purchase and practically one month elapsed between the date of the contract and the due day. The plaintiff had two remedies, *first* to secure an appraisal of the estate. Had such appraisal and the determination thereon been made and the fact appeared as it subsequently did, that the

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premises were not chargeable with a tax, then under our construction of the statute the non-payment of the inheritance tax upon other legacies would not be a sufficient excuse for a failure on part of defendant to complete the contract. *Second.* The officers charged with collection of the transfer tax, for the convenience of beneficiaries and by courtesy to be commended, have for many years within proper limitations executed consents and releases of property both real and personal pending an appraisal of an estate. Plaintiff, however, did not have recourse to the remedies open to her. The appraisal was not commenced until June 4th, 1914. The report of the appraisers is dated January 20th, 1915, and was confirmed on the same day, some six months subsequent to the commencement of this action. The defendant had no means of ascertaining how much or how little tax was chargeable on the premises. He was entitled to receive a marketable title to the premises free from any transfer tax and was not required under the terms of his contract with plaintiff to speculate with reference to the same. In the exercise of reasonable care plaintiff could no doubt have given a marketable title to the premises on the due day. Her failure in that respect cannot be attributed to defendant, and the loss sustained if any must be borne by her. For that reason the judgment should be affirmed, with costs.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK and CRANE, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment affirmed.

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BOTTLETS SEAL COMPANY, Suing in Behalf of Itself and Others, Appellant, v. ROY A. RAINEY et al., Respondents.

Stock corporations — liability of holder of capital stock, not fully paid, for debts of corporation — liability of such stockholder for royalties for use of patent, which accrued after his purchase of stock.

1. Under the statute (Stock Corporation Law, § 56; Cons. Laws, ch. 59) providing that "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him *for debts of the corporation contracted while such stock was held by him,*" a sum payable upon a contingency is not a debt "contracted" and does not become a debt, for which the stockholder is liable under the statute, until the contingency has happened.

2. Where an agreement granted the sole right and license to manufacture, use and sell certain patented articles for a fixed period in consideration of a fixed license fee or royalty to be paid upon each article sold and delivered by the grantee or his assigns, such royalties not to be less in the aggregate than a specified amount, such an agreement is contingent and creates no debt until the time stipulated for payment arrives; the contract is for a future indebtedness to be incurred and paid, in amounts designated by the contract when the consideration is furnished; hence, when the licensee named in that contract transferred his rights thereunder to a corporation which agreed to carry out the terms but which failed to pay the amounts which became due for royalties as articles were sold and delivered, the licensor can maintain an action under the statute against a holder of stock not fully paid, in such assignee corporation, for his liability for such debt of the corporation so contracted while such stock was held by him. A contention of defendant that the debt was contracted when the assignment was made and before he became a stockholder cannot be sustained.

BottleTS Seal Co. v. Rainey, 180 App. Div. 935, reversed.

(Argued January 6, 1919; decided January 21, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 7, 1917, which affirmed a judgment

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in favor of defendant, entered upon an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Alfred D. Lind and *Alexander Pfeiffer* for appellant. The contract was executory. (*Matter of Tear Off Bottle Seal Co.*, 224 Fed. Repr. 492.) The contract is exactly analogous to a lease so far as the accrual of debts thereunder is concerned. (*Thistle v. Jones*, 123 App. Div. 40.) The debt for royalties accrued from period to period, exactly as debts for rent under a lease accrue as the rent reserved becomes payable from time to time. (*Thistle v. Jones*, 123 App. Div. 40; *Sanford v. Rhoades*, 113 App. Div. 782; *Dunn v. Neustadt*, 72 Misc. Rep. 1.)

William Murray for respondents. The stockholder is not liable for debts of the corporation which were contracted before he became such holder. (White on Corp. [8th ed.] 489; *Brick v. Brewster*, 150 App. Div. 202.) Plaintiff's grant to Horner was not a license. It was an assignment of the patent and vested the title in Horner. (*Waterman v. Mac Kenzie*, 138 U. S. 252; *Rude v. Westcott*, 130 U. S. 152; *Boesch v. Graff*, 133 U. S. 697.) The debt of defendant's corporation to plaintiff was contracted on December 28, 1909. (*Hatch v. Oil Co.*, 100 U. S. 130; *Burrows v. Whitaker*, 71 N. Y. 291; Story on Sales, § 236; *Walla v. Walla*, 172 U. S. 1; *Vernon v. Palmer*, 16 J. & S. 231.)

POUND, J. Respondent was sued as a holder of capital stock, not fully paid, by a creditor of Tear Off Bottle Seal Company, under section 56, Stock Corporation Law (Cons. Laws, ch. 49), which reads as follows: "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its

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creditors, to an amount equal to the amount unpaid on the stock held by him *for debts of the corporation contracted while such stock was held by him.*" He demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer has been sustained and the complaint dismissed. It is alleged in the complaint that the debt of the corporation, which plaintiff is seeking to enforce, arose as follows:

In December, 1909, the plaintiff granted to one Horner the sole right and license to manufacture, use and sell certain patented bottle caps for a term extending from the date of the agreement to and beyond July 1, 1913, and in consideration of the granting of such license and patent rights, Horner agreed to pay to the plaintiff a license fee or royalty of one cent per gross on each gross of bottle caps and seals sold and delivered by the said Horner, or his assigns, and further agreed that the amount of the royalty to be paid to the plaintiff for the period ending July 1, 1911, should not be less than \$10,000; for the period between July 1, 1911, and July 1, 1912, not less than \$15,000; and for the period beginning July 1, 1912, and ending July 1, 1913, not less than \$20,000; and it was further agreed that if the aggregate royalties should be less than these sums, Horner or his assigns would pay to the plaintiff the amount of such deficiency.

After the execution and delivery of the agreement, and on or about December 28, 1909, Horner, with the plaintiff's consent, transferred all his interest therein to Tear Off Bottle Seal Company, which, in consideration of the consent to the assignment being granted, assumed and agreed to perform and carry out all the terms thereof, which would otherwise have been required to be carried out by Horner. It failed and refused to carry out the terms of its agreement, by failing to pay the amounts thus agreed upon when they became due. Respondent became a

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holder of stock not fully paid on January 10, 1910. His contention is that the debt was contracted on December 28, 1909, when the assignment was executed. Plaintiff contends that upon the assignment of the agreement a contingent liability was incurred which ripened into a debt only as bottle caps and seals were manufactured, sold and delivered and the payments fell due.

The proper definition of the term "debt contracted" is to be sought in the legislative intent to enforce the obligation to pay for stock which is assumed by one who becomes a stockholder. It is generally held under such statutes that a sum payable upon a contingency is not presently a debt and does not become a debt until the contingency has happened. (*Garrison v. Howe*, 17 N. Y. 458.) Such decisions have had the result of relieving from liability those who were directors when the agreement creating the liability was signed, because it is said that their cases were not fairly within the language of the statute. The same rule of construction must be applied to impress liability as is applied to avoid it.

The agreement between Horner and Tear Off Bottle Seal Company transferred no more than a mere license, giving the latter the right to make, use and sell the patented article for a period less than the full term of the patent. The complaint alleges neither that the entire and unqualified monopoly, nor an undivided part thereof, nor the exclusive right thereunder within a specified part of the United States was conveyed or received by the corporation. (*Waterman v. Mackenzie*, 138 U. S. 252, 255; *Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 248.) The transaction was not, properly speaking, an assignment. The covenanted payments are for the right to manufacture, use and sell free from interference. The licensor, in law, undertakes merely that it will not sue for infringement during the period

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covered by the agreement. (*Hawks v. Swett*, 4 Hun, 146.) The licensee obtains the authority or permission to use for a period the patent rights of plaintiff on payment of compensation therefor at a rate to be determined by the number of bottle caps, seals or closures sold or delivered by it. An agreement to pay such royalties is contingent and creates no debt until the time stipulated for payment arrives. The rights of the licensee may, before the obligation to pay matures, be lost by the interference of the licensor or by assertion of a paramount right by a third party, or the license may be abandoned or assigned, with the consent of the licensor, or under conditions terminating the obligation to pay royalties.

It is urged that, as to the minimum payments, the full liability of the corporation was fixed when the assignment was made and that as to such amounts the debt was then contracted. But the promise to make such payments is not absolute. In legal contemplation, the enjoyment of the undisturbed use of the patent, not the mere execution of the grant, is the consideration for the royalties. The debt is not contracted until the consideration is furnished. (*Garrison v. Howe*, *supra*; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Gold v. Clyne*, 134 N. Y. 262.) If the right to make, use and sell the patent terminates meanwhile; if the licensor does not respect the right; if it had no right to transfer; then the duty to pay royalties ceases; the time for payment never arrives and the debt is not contracted.

When a lease calling for fixed payments of rent is signed, no debt is contracted until the premises are used or the rent becomes due. (*Deane v. Caldwell*, 127 Mass. 242, 244; *Watson v. Merrill*, 136 Fed. Rep. 359; 69 L. R. A. 719; *Matter of Roth & Appel*, 181 Fed. Rep. 667, 669; 31 L. R. A. N. S. 270; *Thistle v. Jones*, 123 App. Div. 40; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1, 19, 20.) The same rule applies here. The

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debt is not contracted until it becomes a fixed liability, absolutely owing, established under the terms of the contract. The contract is for a future indebtedness to be incurred which defines the minimum amount to be paid when the consideration is furnished.

The judgment appealed from should be reversed and the demurrer overruled, with costs in all courts, with leave to answer within twenty days on payment of costs.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ., concur.

Judgment reversed, etc.

MARY QUEENEY, Appellant, v. GEORGE WILLI, JR.,
Respondent.

JOHN QUEENEY, Appellant, v. GEORGE WILLI, JR.,
Respondent.

Evidence — distinction between insufficient evidence and unsatisfactory evidence — landlord and tenant — negligence — when evidence of negligence of landlord sufficient to make a case for the jury — order of reversal — finding of negligence disapproved requires new trial (Code Civ. Pro. § 1338).

1. There is a distinction between insufficient evidence and unsatisfactory evidence. The statement that "insufficient evidence is, in the eye of the law, no evidence," merely means insufficient in law, not insufficient to the mind of one trier of fact with whom others may with reason differ. If any legitimate conclusion can reasonably be drawn from the evidence it should not be wholly rejected by the court. The jury should pass upon it and if the trial judge or the Appellate Division is not satisfied with the soundness of the conclusions reached, the verdict should be set aside and a new trial ordered.

2. Actions by tenants against their landlord for negligently failing to protect water pipes under his control from frost whereby the pipes burst and water fell through the ceiling bringing the plaster down with it injuring plaintiff and causing conditions for which damages are sought. Upon the evidence the landlord had sufficient notice of the defective condition of the water pipes to make a case for the jury to pass upon and plaintiff's complaints should not have been dismissed.

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3. The bodily injuries sustained by plaintiff in one of the actions as the immediate result of being struck by the falling plaster should not be considered as elements of damage under the complaint which declares on the injuries resulting from the dampness only. "Substantial justice between the parties" (Code Civ. Pro. § 519) means justice to both parties.

4. The orders of reversal specify that the finding of the jury that the defendant was guilty of negligence is disapproved by the Appellate Division. It thus appears that the judgments were reversed on questions of fact as well as on the law. A new trial must, therefore, be granted. (Code Civ. Pro. § 1338.)

Queenev v. Willi, 171 App. Div. 588, reversed.

(Submitted January 10, 1919; decided January 21, 1919.)

APPEAL in each of the above-entitled actions from a judgment entered March 17, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The first action was to recover for personal injuries alleged to have been occasioned plaintiff through the negligence of defendant. The second was to recover for the loss of a wife's services due to such injuries.

The facts, so far as material, are stated in the opinion.

James B. Mackie and *Herbert C. Smyth* for appellants. The evidence required a submission to the jury. (*Kassner v. Weintraub*, 130 N. Y. Supp. 229; *Golob v. Pasinsky*, 178 N. Y. 458; *Dollard v. Roberts*, 130 N. Y. 269; *Levy v. Roosevelt*, 131 App. Div. 8; *Pincus v. Schlechter*, 167 App. Div. 361; *Frank v. Simon*, 109 App. Div. 38; *Rubenstein v. Hudson*, 86 N. Y. Supp. 750; *Kassner v. Weintraub*, 130 N. Y. Supp. 229; *Abramowitz v. Schlesinger*, 152 N. Y. Supp. 337; *Obendorfer v. Hart*, 145 N. Y. Supp. 50; *Worthington v. Parker*, 11 Daly, 545; *Rauth v. Davenport*, 60 Hun, 70; *Fitch v. Armour*, 27

J. & S. 413; *Coleman v. Central Trust Co. of N. Y.*, 25 Misc. Rep. 295.) There was no variance between the pleading and the proof. (1 Nichols New York Practice, 1035; *Disbrow v. Harris*, 122 N. Y. 362; *King v. McKellar*, 109 N. Y. 215; *Simpson v. Cowan*, 56 Barb. 395; Abb. Brief on Pleadings [1st ed.], § 724; *White v. Spencer*, 14 N. Y. 247; *Williams v. N. Y. & Q. C. R. Co.*, 97 App. Div. 133; *Becker v. N. Y., L. E. & W. R. Co.*, 31 N. Y. S. R. 750; *Powell v. Cohoes Ry. Co.*, 136 App. Div. 204; *Sallie v. N. Y. Railway Co.*, 110 App. Div. 655; *Turner v. Nassau Electric Co.*, 41 App. Div. 213; *McCahill v. N. Y. Transportation Co.*, 201 N. Y. 221; *Keen v. Village of Waterford*, 130 N. Y. 192; *Lyons v. Second Ave. Railway Co.*, 89 Hun, 374; *Hurley v. N. Y. & Brooklyn Brewing Co.*, 13 App. Div. 167.)

Stephen P. Anderton, Edward K. Hanlon and Alfred W. Meldon for respondent. There was no notice to the landlord of the supposed defect, that the pipe which burst in its concealed position between the roof and the ceiling was not covered with insulating material. (*Ruppert v. Brooklyn Heights R. R. Co.*, 154 N. Y. 90; *Lopez v. Campbell*, 163 N. Y. 340; *People v. Rozezicz*, 206 N. Y. 249; *Lamb v. Union Ry. Co.*, 195 N. Y. 260; *O'Gara v. Eisenlohr*, 38 N. Y. 296.) As the landlord had no notice of the supposed defect, which was concealed, the complaint was properly dismissed. (*Cohen v. Cotheal*, 156 App. Div. 784; *Kassner v. Weintraub*, 130 N. Y. Supp. 229; *Abramowitz v. Schlessinger*, 152 N. Y. Supp. 337; *Golob v. Pasinsky*, 178 N. Y. 458; *Dollard v. Roberts*, 130 N. Y. 269; *Pincus v. Schlechter*, 167 App. Div. 361.) The trial court committed reversible error in holding that the plaintiff was entitled to prove that she had been struck and injured by a portion of the ceiling which fell. (*A. B. & B. Co. v. Addicts*, 19 Misc. Rep. 36; *Wilkins v. Nassau N. D. Co.*, 98 App. Div. 130; *Sheu v. Union*

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R. Co., 112 App. Div. 239; *Finnegan v. Robinson Co.*, 124 App. Div. 117; *Murphy v. Milliken*, 84 App. Div. 582.)

POUND, J. The actions are by tenants against the landlord. They allege that the defendant negligently failed to protect water pipes under his control from frost.

Plaintiffs occupied a top floor apartment in a building owned by defendant. Water was supplied from a tank on the roof. The evidence for the plaintiffs is to the effect that from December, 1913, to February, 1914, Queeney, the husband, had noticed that the walls and ceiling of the bedroom were damp. He could get water out of the wall paper by rubbing his hand on it. Notice of this condition was given to the landlord and to the janitor, his agent, some time in January, 1914. At about ten o'clock on the night of February 13, 1914, by reason of the freezing of the water in a vertical pipe between the ceiling of plaintiffs' apartment and the roof of the building, the pipe burst and a large quantity of water fell through the ceiling of the bedroom bringing the plaster down with it. Mrs. Queeney, who was preparing for bed, was struck by the water and plaster. She prematurely gave birth to a child on the same night; her left breast, where she struck the bed, wasted away; she suffered from neurasthenia; caught cold, developed acute bronchitis and tuberculosis. It is said that the circumstances were a competent and producing cause for the conditions.

The pipe which burst was not covered properly to protect it from freezing as pipes in such a position customarily are covered. An expert witness testified that an uncovered pipe, such as this one was, will "sweat" or condense moisture on its outside in cold weather. If it is in a vertical position the moisture will drip into the walls and ceiling, thus giving notice of its condition.

Defendant did not build the house. He had purchased it three years before the accident and had no actual notice of the potential danger from freezing and bursting of exposed pipes. Plaintiffs recovered verdicts in the trial court on the theory that the dampness of the bedroom was constructive notice of a leak or some other defective condition of the premises. The learned Appellate Division held that the inference of defect from dampness was too remote and dismissed the complaints.

The distinction between insufficient evidence and unsatisfactory evidence must be kept in mind. It has often been said that "insufficient evidence is, in the eye of the law, no evidence," but that merely means insufficient in law, not insufficient to the mind of one trier of fact with whom others may with reason differ. If any legitimate conclusion can reasonably be drawn from the evidence it should not be wholly rejected by the court. The jury should pass upon it and if the trial judge or the Appellate Division is not satisfied with the soundness of the conclusions reached, the verdict should be set aside and a new trial ordered. (*Getty v. Williams Silver Co.*, 221 N. Y. 34, 39.)

The chain of reasoning most favorable to plaintiffs might legitimately consist of these links: walls are not so damp in cold weather when the structure is free from defect; their condition is not consistent with proper repair or construction; damp ceilings may fall, it is probable that they will fall; a prudent landlord will exert himself to ascertain the cause of the dampness before they fall and do harm to the occupants of the rooms; if the plaintiffs' witnesses are to be believed, a plumber summoned to find the trouble would at once decide that sweating pipes might be, and, by a process of exclusion, were the cause of the dampness.

The damp walls were plain notice of something to be remedied. The landlord may not sit helplessly by and

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say that he cannot see what produces such conditions. He must reasonably bestir himself to discover the cause and correct it. Continued dampness of ceilings may to one observer seem a trifling circumstance and at best no warning of exposed pipes or leaks, while to another the warning would be plain and significant. Courts should not speak too confidently in determining as matter of law what facts may be ignored by prudent people whose duty it is to be reasonably careful for the personal safety of others. We think that plaintiffs' evidence made a case for the jury to pass upon and that their complaints should not have been dismissed.

The orders of reversal specify that the finding of the jury that the defendant was guilty of negligence is disapproved by the Appellate Division. It thus appears that the judgments were reversed on questions of fact as well as on the law. A new trial must, therefore, be granted. (Code Civ. Pro. § 1338.) On the new trial, we are of the opinion that the bodily injuries sustained by Mrs. Queeney as the immediate result of being struck by the falling plaster should not be considered as elements of damage under the complaint as it now reads. The pleading declares on the injuries resulting from the dampness only. "Substantial justice between the parties" (Code Civ. Pro. § 519) means justice to both parties. The result desired may better be obtained by amendment on an orderly application to the court than by amendment under the guise of liberal construction.

The judgments appealed from should be reversed and new trials granted, with costs to abide the event.

HISCOCK, Ch. J., CUDDEBACK, CARDOZO and ANDREWS, JJ., concur; CHASE, J., dissents; McLAUGHLIN, J., not sitting.

Judgments reversed, etc.

ALFRED C. BEATTY, Respondent, v. GUGGENHEIM
EXPLORATION COMPANY et al., Appellants.

Contract — when employer may hold employee as trustee and require him to account for profits of personal transaction — when oral consent of employer to such transaction precludes him from impressing such a trust and acquits employee of breach of written contract forbidding his engaging in business similar to his employer's.

1. An agent or a partner who breaks a covenant not to engage in some other business does not, as a matter of course, become chargeable as a trustee for the profits of the forbidden venture. A constructive trust is the formula through which the conscience of equity finds expression, and when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of the relief.

2. Where an employee agrees with his employer that he will not become directly or indirectly interested in, or connected with, any person engaged in any similar business, and thereafter purchases, in conjunction with another, rights in certain mining claims which he believed to be essential to the successful operation of those in which his employer is interested, the latter, not consenting to the investment, has the privilege, if he so elects, to hold the employee as trustee and may require him to renounce the profits of the transaction and transfer the claims at cost.

3. Where, however, it appears that the employee, when he associated himself with a partner in the enterprise, reserved the right of withdrawal, and the employer, with knowledge that the employee had reserved this privilege, consented that the investment be retained, the employer may not have the aid of a court of equity to impress upon the investment the quality of a constructive trust.

4. Nor does the fact that the written contract of employment contains a covenant that there shall be no waiver or amendment thereof not evidenced in writing, alter the situation. Those who make a contract may unmake it, and where, on the faith of the consent, the employee, as here, turned a loan into a purchase, the consent, though oral, gives protection to the employee, and acquits him of a breach of

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contract. The oral consent is at least equivalent to an election that the agent shall not be charged as a trustee. It is an election between remedies and such an election can be made without a writing.

Beatty v. Guggenheim Exploration Co., 223 N. Y. 294, modified. (See 223 N. Y. 294; 224 N. Y. 595.)

(Re-argued December 2, 1918; decided January 28, 1919.)

RE-ARGUMENT of an appeal from a judgment, entered September 30, 1915, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of defendants entered upon a decision of the court on trial at Special Term and directing judgment in favor of plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion in this case reported in 223 New York, at page 298.

Nathan L. Miller and *Louis Marshall* for appellants. Upon the record the exploration company is entitled to a final judgment on the claim of the plaintiff growing out of the Perry-Exploration Company contract. (*Levy v. Louvre Realty Co.*, 222 N. Y. 14; *City of Buffalo v. D., L. & W. R. R. Co.*, 176 N. Y. 308; *Bremer v. Manhattan Ry. Co.*, 191 N. Y. 333; *Loomis v. Lehigh Valley R. R. Co.*, 208 N. Y. 312.) The exploration company is likewise entitled upon the record to final judgment with respect to the profits which the plaintiff is seeking to withhold from it arising from the Perry-Treadgold contract, which are derived from its treasury. (*Russell v. Winne*, 37 N. Y. 591; *Baldwin v. Short*, 125 N. Y. 553; *Roberts v. Vietor*, 130 N. Y. 600; *Simons v. Goldbach*, 56 Hun, 204; 123 N. Y. 637; *Grover v. Wakeman*, 11 Wend. 187; *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Lilley v. Elwyn*, L. R. 11 Q. B. 742; *Prescott v. White*, 18 Ill. App. 322; *Peterson v. Mayer*, 46 Minn. 468; *Libhart v. Wood*, 1 Watts & S. [Penn.] 265; *Siple v. Stickney*, 190 Mass. 43.) Under no circumstances should the

plaintiff be permitted to recover on the present record any profits derived from the Perry-Treadgold contract. (*Nesbit v. Lockman*, 34 N. Y. 162; *Whitehead v. Kennedy*, 69 N. Y. 466; *Cowee v. Cornell*, 75 N. Y. 99; *Green v. Howorth*, 113 N. Y. 470; *Barnard v. Gantz*, 140 N. Y. 249; *Ten Eyck v. Whitbeck*, 156 N. Y. 353; *Heckscher v. Edenborn*, 203 N. Y. 210; *Condit v. Blackwell*, 22 N. J. Eq. 485; *Dunne v. English*, L. R. 18 Eq. 524; 2 Pom. Eq. Juris. [3d ed.] § 956; *Mechem on Agency*, § 466.)

Charles F. Brown, Henry Wollman and Robert C. Beatty for respondent. The facts which led the court to deny to the plaintiff a recovery of a part of Perry's compensation would not preclude his recovery of the profits arising out of the repurchase by Treadgold of claims 89-104 under the Perry-Treadgold contract. (*Shaeffer v. Blair*, 149 U. S. 248.) The plaintiff, in respect to his agreement with Perry, which is set forth in findings A, 88 and 89, violated no duty which he owed to the Guggenheim Exploration Company as its agent or employee. (*Billings v. Shaw*, 209 N. Y. 265; *Murray v. Beard*, 102 N. Y. 505.) The defendant Guggenheim Exploration Company waived the provision in the plaintiff's contract of employment requiring him to secure its consent in writing to investments. (*Alsens A. P. C. Works v. Degnon Cont. Co.*, 222 N. Y. 34; *Clark v. West*, 193 N. Y. 349; *Moore v. Hanover F. Ins. Co.*, 141 N. Y. 219; *Whipple v. Prudential Ins. Co.*, 222 N. Y. 39; *Pechner v. Phœnix Ins. Co.*, 65 N. Y. 195; *Weed v. L. & L. Ins. Co.*, 116 N. Y. 106; *Solomon v. Vallette*, 152 N. Y. 147, 151; *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257.) The fact that Daniel Guggenheim and Mr. Hammond, when they gave their consent that Beatty might retain his interest in the Perry-Treadgold contract, were not informed of the exact amount of the interest which Beatty had in that contract is immaterial. They knew the exact

amount of Perry's profits under that contract, and that Beatty, who financed the matter, was to have a part of Perry's profits. (*Tilleny v. Wolverton*, 54 Minn. 75; *United States Steel Corporation v. Hodge*, 64 N. J. Eq. 807; *Matter of Niles*, 113 N. Y. 547; *Glor v. Kelly*, 49 App. Div. 617; 166 N. Y. 589; *Hutchinson v. Simpson*, 92 App. Div. 382; *Kelly v. Newburyport Horse R. R.*, 141 Mass. 496; *Prevost v. Gratz*, 6 Wheat. 481; *Selwyn & Co. v. Waller*, 212 N. Y. 507; *I. M. C. Assn. v. Coleman*, L. R. 6 H. L. 189; *New Albany v. Burke*, 11 Wall. 96; *Calivada Col. Co. v. Hays*, 119 Fed. Rep. 202; *C. & B. Colliery Co. v. Black*, 37 L. T. N. S. 740.)

CARDOZO, J. This case is here upon re-argument. We need not rehearse the facts. They are concisely stated in Judge CUDDEBACK's opinion (223 N. Y. 294). We held then that there could be no recovery by the plaintiff of compensation paid to Perry under the Perry-Guggenheim contract. That question is no longer open. We did not pass upon the Perry-Treadgold contract, but left the plaintiff's rights under that contract for adjudication on a second trial. The re-argument thereafter ordered was restricted to a single question. The question is whether plaintiff's rights under the Perry-Treadgold contract may be finally determined now.

The defendants argue that the two contracts are inseparably united in scheme and execution. They say, therefore, that misconduct in respect of one defeats recovery under the other. But we think there is no such union as the argument assumes. The two transactions are clearly severable. The plaintiff had an interest with Perry in claims "89 to 104 below discovery at Bonanza Creek." Those claims were the subject of the Perry-Treadgold contract. The plaintiff had another interest in compensation paid to Perry for services in the Yukon district. That compensation was the subject

of the Perry-Guggenheim contract. Perry had done work, and was entitled to pay. The plaintiff persuaded him to ask for more pay than would otherwise have satisfied him, in order that plaintiff might get a share of it. We held that this was a breach of the plaintiff's duty to his employer. The payment, thus unlawfully swollen, was subject to a constructive trust. Our decision went no farther. But the payment for Perry's services is quite distinct from the payment of Perry's profits in the sale of Treadgold's claims. The amount due under each head is stated in the findings. Increase of the one had no tendency to swell the measure of the other. Subsequent misconduct in another and distinct transaction does not work a forfeiture of rights already lawfully accrued.

There remains, however, a question at once more important and more difficult. It is whether the plaintiff ever lawfully acquired a share in the profits of the Perry-Treadgold contract, considered by itself. He had agreed with his employer that he would not become directly or indirectly interested in, or connected with, any person, partnership or corporation engaged in any similar business. He had also agreed that none of the covenants or conditions of the contract should be "waived, modified, altered, or annulled" except by writing subscribed by the parties, who further covenanted that they would not "urge or claim any such waiver, alteration, modification or amendment unless the same be evidenced by such writing." The finding is that the president and the general manager of the employer knew that plaintiff was interested in the Perry-Treadgold contract and consented thereto, but no written consent was found or proved. The question, therefore, subdivides itself into two branches. One is whether the plaintiff, if he had purchased an interest in the claims without the consent of his employer, would be chargeable as a trustee.

The other is whether consent not evidenced by a writing has varied the employer's rights.

(1) We think the situation is one where an employer, not consenting to the investment, would have the right, if he so elected, to hold the plaintiff as trustee.

The plaintiff was sent to the Yukon to investigate mining claims which were the subject of an option. He found certain other claims which were not included in the option, but which he believed to be essential to the successful operation of those that were included. In conjunction with Perry, he purchased rights in the new claims. The two were partners in the venture. Later his employer, appreciating the importance of the claims, determined to buy them for itself. We think it had the right to say to the agent that he must renounce the profits of the transaction and transfer the claims at cost. A different situation would be presented if the claims had no relation to those which the plaintiff was under a duty to investigate. But they had an intimate relation. One could not profitably be operated without the other. Let us suppose that the plaintiff, instead of buying the claims as a partner with Perry, had bought them alone. No one, we think, would say that he could have retained them against his employer, and held out for an extravagant price, as, of course, he could have done if the purchase was not affected by a trust. It is not an answer to say that he was not bound to risk his money as he did, or to go into the enterprise at all (*Rose v. Hayden*, 35 Kan. 106, 118). He might have kept out of it altogether, but if he went in, he could not withhold from his employer the benefit of the bargain (*Trice v. Comstock*, 121 Fed. Rep. 620; *Felix v. Patrick*, 145 U. S. 317, 327; *Massie v. Watts*, 6 Cranch, 148; *Ringo v. Binns*, 10 Pet. 269; *Gardner v. Ogden*, 22 N. Y. 327; *Sea Coast R. R. Co. v. Wood*, 65 N. J. Eq. 530; *Fox*

v. *Mackreth*, 1 Wh. & T. Lead. Cases in Eq. 141; Perry on Trusts [6th ed.], sec. 206).

We think, therefore, that aside from the special provisions of this contract, the agent became a trustee at the election of the principal. But the contract reinforces that conclusion. It is true that an agent or a partner who breaks a covenant not to engage in some other business does not, as a matter of course, become chargeable as a trustee for the profits of the forbidden venture (*Dean v. MacDowell*, L. R. 8 Ch. Div. 345; *Trimble v. Goldberg*, 1906, A. C. 494, 500; *Aas v. Benham*, 1891, 2 Ch. Div. 244; *Latta v. Kilbourn*, 150 U. S. 524, 547, 548). The agent may be discharged; the partnership may be dissolved; there may be an action for damages.

But to raise a trust there must be more. It is sometimes said that the profits of the forbidden venture must have been diverted from the business of the principal or the partnership (See cases, *supra*). We think it may fairly be found that there was a diversion of profits here. But the test of diversion is not exhaustive. For most cases it may supply a working rule, but the rule is a phase or illustration of a principle still larger. A constructive trust is the formula through which the conscience of equity finds expression. [When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee] (*Moore v. Crawford*, 130 U. S. 122, 128; *Pomeroy Eq. Jur.* sec. 1053). We think it would be against good conscience for the plaintiff to retain these profits unless his employer has consented.

→ The tie was close between the employer's business and the forbidden venture. The profits which the agent claims have come from the employer's coffers. If the agent must account as a trustee, the price which the employer pays is to that extent diminished. If the agent retains the profit, the price is to that extent increased.

Of course it is true that if Perry had made the purchase alone, without the aid of plaintiff, the employer might be no better off. That is true whenever an agent goes into some competing venture. His associates might have succeeded in diverting equal profits without him. The disability is personal to him. Others may divert profits from the business of the principal. He may not. If he does, he must account for them.

(2) We conclude, therefore, that the plaintiff was chargeable as a trustee if the employer so elected. But the Appellate Division has found upon sufficient evidence that the employer consented to the investment. The plaintiff, when he associated himself with Perry, reserved the privilege of withdrawal. The contract was that if the president or the general manager disapproved of his investment, then the payment which he had made, instead of being a purchase of a share in a joint enterprise, should be a loan to Perry personally. This is found by the trial judge as well as by the Appellate Division. The testimony is that, in that event, the loan was to be repaid in a reasonable time. The president and the general manager, with knowledge that the plaintiff had reserved this privilege of withdrawal, consented that the investment be retained. The question is whether the employer may now have the aid of a court of equity to impress upon the investment the quality of a constructive trust.

The question would answer itself if it were not for the covenant that there shall be no waiver or amendment not evidenced by a writing. The employer sets up this covenant to nullify its oral consent. The employee asserts that the covenant is nugatory. Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. "Every such agreement is ended by the new one which con-

tradicts it" (*Westchester F. Ins. Co. v. Earle*, 33 Mich. 143, 153). What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again (*Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195, 204, 205; *Solomon v. Vallette*, 152 N. Y. 147, 151; *F. F. Ins. Co. v. Norwood*, 69 Fed. Rep. 71; *McElroy v. B. A. Assur. Co.*, 94 Fed. Rep. 990; *Westchester F. Ins. Co. v. Earle*, *supra*; Ewart on the Law of Waiver, p. 286). The defendant argues that there was a *locus pœnitentiæ*. The plaintiff, we are told, did nothing on the faith of the consent, and hence the defendant should be permitted to recall it. There may be other answers to that argument, but it is a sufficient one, we think, that at the time of the consent the transaction was still executory. The plaintiff had reserved the right to withdraw from the joint enterprise if his employer disapproved of it, and in that event to treat his advances as a loan. On the faith of the consent, he turned a loan into a purchase. It is too late, years afterwards, for the employer to cancel the consent, and insist that the purchase be turned back into a loan.

We hold, therefore, that the consent, though oral, gives protection to the agent, and acquits him of a breach of contract. But if this were doubtful, another path would bring us to the same result. The question here is not whether a contract has been broken. There has been no attempt to discharge the agent, to terminate his contract, or to hold him liable for damages. The question is whether the breach, if it be assumed, demands the implication of a trust. The oral consent is at least sufficient to preclude that implication. It is at least equivalent to an election that the agent, however delinquent, shall not be charged as a trustee. To use it for that purpose is not to waive or change a provision of

the contract, and so the covenant does not apply, even if it could ever be effective. Much of the trouble comes from the use of the misleading word "waiver" (Ewart Law of Waiver, p. 3). It is made to stand for many things — sometimes for estoppel, sometimes for contract, sometimes for election (Ewart, *supra*). The oral consent may not have created an estoppel, nor modified a contract, and yet it may have established an election. Admit for the purpose of the argument that the plaintiff broke his contract when he took an interest in a mine. Even then, the employer was not *bound* to charge him as a trustee. At the utmost, it had a right of election (*Hammond v. Hopkins*, 143 U. S. 224; *Kahn v. Chapin*, 152 N. Y. 305, 309). It might adopt or reject the purchase. Neither adoption nor rejection would be a change of the contract. It would be an election between remedies. But plainly such an election could be made without a writing. It is one thing to hold that a writing is necessary to obliterate the wrong. It is another thing to exact a writing where there has been nothing but a choice among the remedies that are available for the redress of wrong. The plaintiff said to his employer: "I can treat this transaction either as a loan or as a joint venture. Which shall I do?" The employer answered: "You may treat it as the latter." After an election so decisive, announced while there was still an opportunity to withdraw, good conscience no longer demands that the agent be charged as a trustee. A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.

Our conclusion, therefore, is that the judgment of the Appellate Division should be modified so that the award made to the plaintiff shall be limited to his share of the profits under the so-called Perry-Treadgold contract, to wit: \$27,300 in cash with interest from April 1, 1908,

and 5,460 shares of the capital stock of the Yukon Gold Company of the par value of \$27,300 with any dividends declared thereon since April 1, 1908; that in the event of any dispute between the parties as to the correctness of the aforesaid computation of profits either party shall be at liberty to apply to the Special Term of the Supreme Court at the foot of the judgment herein for further directions with reference thereto; that they may also make like application for further directions in respect of the enforcement of the judgment if such directions become necessary; and that as so modified, the judgment of the Appellate Division be affirmed, without costs to either party in any court.

HISCOCK, Ch. J., CHASE, COLLIN and CRANE, JJ., concur; CUDDEBACK and HOGAN, JJ., dissent and vote for a new trial.

Judgment accordingly.

ANGIE M. BOOTH et al., Appellants, v. WILLIAM H. W. KNIPE et al., Respondents.

Real property — deed — restrictive covenants — when restrictions in deed as to kind of houses and use thereof to be erected upon land conveyed to grantee run with the land and bind subsequent purchasers thereof — when a breach of such restrictions may be restrained by injunction.

The owner of a block on a street in New York city sold lots therefrom during a period of thirteen years, the owner after the last sale retaining nothing for himself. Uniform restrictions were part of the plan and were imposed by the grantor upon each lot by the following provision: "This conveyance is made * * * on the agreement that he, the said party of the second part, his heirs and assigns, shall, within two years from the date hereof, cause to be erected and fully completed upon said lot, a first-class building, adapted for and which shall be used only as a private residence for one family, and which shall conform to the plans made or being made" by an architect therein named "for the whole front between 72nd and 73rd Streets, on River-

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side Drive, and said conveyance is made and said lot is sold upon that condition." The grantee of the lot in question built thereon and used the building as a private dwelling. The present occupant, a tenant of the successor in interest, is using it as a maternity hospital. *Held, First*, there is a negative duty imposed by the covenant to refrain from the prohibited use. That duty runs with the land, and charges all who take with knowledge of its terms. This is more than a limitation upon construction. It is a restriction of enjoyment. *Second*, a covenant of this kind is sometimes for the benefit of the grantor personally, and sometimes for the benefit of successive lot owners. Whether it is of the one class or of the other is a question of intention, which is to be gathered, not merely from the language of the deed, but from all the surrounding circumstances. Enough is shown here to justify the conclusion as an inference of fact that the scheme embraced the tract, and that all who might thereafter buy were within the range of the intended benefit. *Third*, the attempted use is a breach of the restriction which may be restrained by injunction in an action brought by owners of neighboring dwellings.

Booth v. Knipe, 178 App. Div. 423, reversed.

(Argued January 7, 1919; decided January 28, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered July 13, 1917, which reversed an order of Special Term granting a motion for an injunction *pendente lite*.

The following questions were certified:

"1. Is the agreement contained in the deed from Sutphen to Kleeberg of the premises which are the subject of this action, a covenant running with the land?

"2. Does it bind the present owners and occupants of the property on that block front?

"3. Is it confined to the first house erected on each lot?

"4. Is the agreement enforceable by owners of the other properties on that block front?

"5. If the agreement in the deed from Sutphen to Kleeberg is a covenant running with the land, is the use

of the premises by the defendants as disclosed by the papers before the court a violation of such covenant?

"6. Does the complaint state facts sufficient to constitute a cause of action in favor of the plaintiffs against the defendants?"

The facts, so far as material, are stated in the opinion.

Herbert McKennis, Robert F. Greacen and Theodore W. Morris, Jr., for appellants. The agreement contained in the deed from Sutphen to Kleeberg constitutes a covenant running with the land. (*Graves v. Deterling*, 120 N. Y. 455; *Post v. Weil*, 115 N. Y. 361; *Avery v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 142; *Zweig v. Sweedler*, 140 App. Div. 319; *Union Stock Yards Co. v. Nashville Packing Co.*, 140 Fed. Rep. 701; *Coleman v. Beach*, 97 N. Y. 545; *Morehouse v. Woodruff*, 218 N. Y. 494.) The agreement is a restriction binding on the present owners and occupants of the property on the block front on Riverside Drive between Seventy-second and Seventy-third streets. (*R. L. Assn. v. Kellogg*, 144 N. Y. 348; *Mott v. Oppenheimer*, 145 N. Y. 212; *Silberman v. Uhrlaub*, 116 App. Div. 869; *Acer v. Westcott*, 46 N. Y. 384; *Lattimer v. Livermore*, 72 N. Y. 174; *Rowland v. Miller*, 139 N. Y. 93; *McDonald v. Spang*, 55 Misc. Rep. 332; *Levy v. Halcyon Casino Hotel Co.*, 45 Misc. Rep. 289; *Zipp v. Barker*, 40 App. Div. 1, 6; *De Lima v. Mitchell*, 49 Misc. Rep. 171.) The agreement is a restriction on the use of the premises, at least during the existence of the first house which was erected on each lot. (*Horner v. C., M. & S. P. Ry. Co.*, 38 Wis. 175.) The restriction is enforceable by the owners of the adjoining property on the block front in question. (*Korn v. Campbell*, 192 N. Y. 490.) The use of the premises by the defendants, as disclosed by the papers before the court, is a violation of the agreement contained in the deed from Sutphen to Kleeberg. (*Levy v. Schreyer*, 177 N. Y. 293; *Kalb v.*

Mayer, 164 App. Div. 577; *Goodhue v. Pennell*, 164 App. Div. 821; *Barnett v. Vaughan Institute*, 134 App. Div. 921; 197 N. Y. 541.)

George L. Ingraham for respondents. The agreement or condition contained in the deed from Sutphen to Kleeberg was not a covenant restricting the use of the premises conveyed which ran with the land, but was an affirmative agreement to carry out a building scheme, which was satisfied by the erection of the building thereon in accordance with the agreement. (*Hurley v. Brown*, 44 App. Div. 480; *Duryea v. Mayor, etc.*, 62 N. Y. 592; *Blackman v. Striker*, 142 N. Y. 555; *Clark v. Devoe*, 124 N. Y. 120; *Miller v. Clary*, 210 N. Y. 127; *R. P. D. Church v. M. A. Bldg. Co.*, 214 N. Y. 268; *Kurtz v. Potter*, 44 App. Div. 480; *Krekeler v. Aublach*, 51 App. Div. 591; 169 N. Y. 372; *Haywood v. B., etc., Society*, L. R. 8 Q. B. 403; *London & S. W. Ry. Co. v. Gomm*, L. R. 20 Ch. Div. 562; *Sins on Covenants*, 242, 243; *Holford v. Acton*, 2 Ch. 1890, 240.) From the allegations of the complaint and the undisputed proof before the court at Special Term, the premises in question were used only as a private residence for one family. (*Gallon v. Hussar*, 172 App. Div. 393; *Smith v. Graham*, 161 App. Div. 803; *Stone v. Pillsbury*, 167 Mass. 332; *Hoffman v. Parker*, 239 Penn. St. 398.) Because of the changed character of the neighborhood no covenant restricting the use of the land which would prevent an occupant of the house from receiving patients and treating them should be enforced in equity. (*Columbia College v. Thacher*, 87 N. Y. 316; *Kitchin v. Brown*, 180 N. Y. 414.)

CARDOZO, J. The defendant Waterside Land Corporation is the owner, and the defendant Knipe the tenant, of a building on Riverside Drive between Seventy-second and Seventy-third streets in the city of New York. The

tenant, who is a physician, uses the building for the reception and care of women in child-birth. The action is brought by owners of neighboring dwellings to enjoin the continuance of the use as a violation of a restrictive covenant. An injunction granted at Special Term was reversed at the Appellate Division.

In 1896 one John S. Sutphen was the owner of the entire block between Seventy-second and Seventy-third streets fronting on Riverside Drive. He formed a general plan to improve and develop the land, and filed in the office of the register a map dividing it into lots. The lots, when sold, were conveyed by reference to the map. The first sale in June, 1896, included the site of the defendants' building, and was made to one Kleeberg, from whom, by mesne conveyance, the lot reached its present ownership. The last sale was made in December, 1909, more than thirteen years later. Uniform restrictions were part of the plan both as conceived and as executed. They were imposed by the common grantor upon the sale of every lot. The slight variances of phraseology suggest no variance of substance. In the deed to Kleeberg the restriction reads as follows:

"This conveyance is made by the said parties of the first part to the said party of the second part, on the agreement that he, the said party of the second part, his heirs and assigns, shall, within two years from the date hereof, cause to be erected and fully completed upon said lot, a first-class building, adapted for and which shall be used only as a private residence for one family, and which shall conform to the plans made or being made by C. H. P. Gilbert, architect, No. 18 Broadway, New York City, for the whole front between 72nd and 73rd Streets, on Riverside Drive, and said conveyance is made and said lot is sold upon that condition."

Within the time limit prescribed, Kleeberg built upon

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the lot. He used the building as a private dwelling. His grantee used it for a like purpose. The present occupant asserts the right to use it as he pleases. In this position the Appellate Division has sustained him. The restrictive covenant is said to have spent its force when Kleeberg built the dwelling; the burden did not pass to subsequent grantees.

We reach a different conclusion. The covenant has a two-fold aspect (*Hart v. Lyon*, 90 N. Y. 663). There is the affirmative duty to build. That duty has been discharged, and we do not need to determine whether it was limited to the first grantee (*Miller v. Clary*, 210 N. Y. 127). There is the negative duty to refrain from the prohibited use. That duty runs with the land, and charges all who take with knowledge of its terms (*Rowland v. Miller*, 139 N. Y. 93; *Thompson v. Diller*, 161 App. Div. 98, 101; *Hart v. Lyon*, *supra*). A restriction almost identical was construed and enforced in *Hopkins v. Smith* (162 Mass. 444). The covenant is not merely to build a structure adapted for a given use. The covenant is that the structure, when built, shall be restricted to that use. It "shall be used *only* as a private residence," and a private residence "for one family." This is more than a limitation upon construction. It is a restriction of enjoyment.

The argument is made that the restriction is futile, and that equity should refuse to enforce it because of its futility. We are told that an owner may tear the dwelling down, and that nothing in the covenant will restrict the building to be substituted. If the premise be assumed, the conclusion of futility does not follow. Restrictions upon the form or the use of the first building to be constructed are common in conveyances (*Kurtz v. Potter*, 44 App. Div. 262; 167 N. Y. 586). They do not become worthless because a second building may be different. Owners of land know that buildings are put

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up to be used. They are not put up to be destroyed. To fix their character at the beginning may shape the future of the neighborhood. We do not refuse to enforce a covenant while it lasts because it may not last forever. Limitations are not illusory because they are not complete. The burden clings to the land till the building loses its identity.

We have spoken of the incidence of the burden. We must determine the incidence of the benefit. The plaintiffs say that there was a common building scheme, affecting a known area (*Hopkins v. Smith*, 162 Mass. 444). They say that the purpose of the grantor in imposing the restrictions was to effectuate the scheme, and to maintain for the benefit of purchasers the character of the neighborhood. In fulfilment of that purpose, like covenants were inserted upon the sale of every lot. They were inserted even upon the last sale, at a time when the grantor retained nothing for himself. They require conformity to a plan prepared by an architect "for the whole front between 72nd and 73rd Streets." They thus disclose upon their face the scope and unity of the scheme. A covenant of this kind is sometimes for the benefit of the grantor personally, and sometimes for the benefit of successive lot owners. Whether it is of the one class or of the other is a question of intention (*Hano v. Bigelow*, 155 Mass. 341, 343; *Hartt v. Rueter*, 223 Mass. 207; *Korn v. Campbell*, 192 N. Y. 490). The intention is to be gathered, not merely from the language of the deed, but from all the surrounding circumstances. Enough is shown here to justify the conclusion as an inference of fact that the scheme embraced the tract, and that all who might thereafter buy were within the range of the intended benefit (*Hopkins v. Smith*, *supra*; *Hartt v. Rueter*, *supra*; *Brouwer v. Jones*, 23 Barb. 153; *Thompson v. Diller*, 161 App. Div. 98, 101, 104; *Renals v. Cowlshaw*, L. R. 9 Ch. D. 125, 129; *Nottingham*

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Patent Brick & Tile Co. v. Butler, L. R. 16 Q. B. D. 778, 784; *Rogers v. Hosegood*, L. R. 1900, 2 Ch. 388; *Elliston v. Reacher*, L. R. 1908, 2 Ch. 374; *affd.*, 1908, 2 Ch. 665; *Reid v. Bickerstaff*, L. R. 1909, 2 Ch. 305, 319; *Korn v. Campbell*, *supra*).

We cannot doubt that the attempted use is a breach of the restriction. The lease provides that the building shall be "occupied as a sanatorium and not otherwise." The evidence makes it clear that it is used as a maternity hospital. By no stretch of language can we say that this is equivalent to use "as a private residence for one family" (*Smith v. Graham*, 161 App. Div. 803; *affd.*, 217 N. Y. 655; *Barnett v. Vaughan Institute*, 134 App. Div. 921; 197 N. Y. 541).

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in the Appellate Division and in this court; and the questions certified should be answered in the affirmative.

HISCOCK, Ch. J., CHASE, HOGAN, POUND and ANDREWS, JJ., concur; McLAUGHLIN, J., dissents.

Order reversed, etc.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Appellant, for a Writ of Prohibition against PUBLIC SERVICE COMMISSION, SECOND DISTRICT, et al., Respondents.

Interstate commerce — natural gas — public service commission — although the transportation of natural gas by pipe lines, from another state to this, is interstate commerce, the price at which such gas is sold within the state is subject to regulation by the public service commission in the absence of Federal regulation.

1. The transportation of oil or gas from state to state through the medium of pipe lines to be delivered by the seller in one state to the buyer in another is interstate commerce, and subject to the power

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of the nation. Interstate commerce does not end until the subject-matter of the sale has been broken up or redistributed or absorbed in the common mass of property within the state, and where there is no break in the continuity of the transmission of natural gas from the pumping station in one state to home and office and factory in a city in another state, such transactions have the unity and directness of interstate commerce.

2. A corporation transporting natural gas by pipe lines from one state to another is a public service corporation and its rates are subject to regulation by some agency of government, and where gas and water companies are expressly excepted from the act of Congress (Act to Regulate Commerce, as amended June 29, 1906, ch. 3591, and June 18, 1910, ch. 309) regulating interstate commerce, there is no implied exclusion of the police power of the state to impose reasonable regulations upon the business of such public service corporation, although interstate in character.

3. Where a company engaged in the transportation of natural gas by pipe lines from another state to a city in this state occupies the streets of that city with its gas mains it is within the purview of the statute (Public Service Commissions Law, § 65; Cons. Laws, ch. 48) providing that all charges made or demanded by public service corporations for gas or electricity shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Hence a writ of prohibition will not lie against a public service commission to prevent it from considering whether certain rates sought to be put in operation by such a pipe line are exorbitant. (*Western Union Tel. Co. v. Foster*, 247 U. S. 105, distinguished.)

Matter of Penn. Gas Co. v. Public Service Comm., 184 App. Div. 556, affirmed.

(Argued January 8, 1919; decided January 28, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered September 30, 1918, which reversed an order of Special Term granting a motion for a writ of prohibition.

The facts, so far as material, are stated in the opinion.

Marion H. Fisher and *John E. Mullin* for appellant.
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delegated by the Constitution to the Federal government is exclusive: The states have no power to regulate, burden or restrict interstate commerce. (U. S. Const. art. 1, § 8; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Houston*, 114 U. S. 622; *Walling v. Michigan*, 116 U. S. 455; *Wabash, St. L. & Pacific R. R. Co. v. Illinois*, 118 U. S. 557; *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 507; *Leisy v. Hardin*, 135 U. S. 100; *Lyng v. Michigan*, 135 U. S. 161; *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U. S. 204; *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27; *Caldwell v. North Carolina*, 187 U. S. 622; *Oklahoma v. Kansas Nat. Gas Co.*, 221 U. S. 261; *Minnesota Rate Cases*, 230 U. S. 352; *Clark Distilling Co. v. Maryland R. R. Co.*, 242 U. S. 311; *Southern Pac. Co. v. Jensen*, 244 U. S. 205.) The transportation and sale of gas by pipe line in interstate commerce is a business national in character and susceptible of Federal regulation. (*West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Kansas Natural Gas Co. v. Haskell*, 172 Fed. Rep. 545; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; *Haskell v. Cowham*, 187 Fed. Rep. 403; *Landon v. Public Utilities Commission*, 242 Fed. Rep. 682.) The distribution and sale of relator's Pennsylvania gas to consumers in New York is a vital and protected part of relator's interstate business. The "original package" rule does not apply to gas transported by pipe line. (*Brown v. Maryland*, 12 Wheat. 419; *M. W. T. Co. v. Comm.*, 218 Mass. 558; *Hatch v. Reardon*, 184 N. Y. 452; *State Freight Tax*, 15 Wall. 232; *Illinois Central R. R. Co. v. Louisiana Ry. Co.*, 236 U. S. 157; *Covington Stock Yards Co. v. Keith*, 136 U. S. 128; *North Penna. R. R. Co. v. Bank*, 123 U. S. 727; *Swift & Company v. United States*, 196 U. S. 398; *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346; *Greek American Sponge Co. v. Richardson Drug Co.*, 124 Wis. 475; *T. & N. O.*

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R. R. Co. v. Sabine Tram Co., 227 U. S. 111.) The state of New York has no power or jurisdiction to fix the rate or sale price of relator's gas. Such action would be a regulation of and interference with commerce forbidden by the Constitution. (*People ex rel. Hatch v. Reardon*, 184 N. Y. 431; *West v. Kansas Gas Co.*, 221 U. S. 229; *Heyman v. Hays*, 236 U. S. 178; *Clark Distilling Co. v. Maryland Ry. Co.*, 242 U. S. 311; *R. R. Comm. v. Worthington*, 225 U. S. 101; *W. U. Tel. Co. v. Kansas*, 216 U. S. 1.)

Ledyard P. Hale for Public Service Commission, respondent. The "commerce" conducted by appellant being expressly excluded by Congress from the jurisdiction of the interstate commerce commission remains within the reach of reasonable regulation by the states, and, therefore, in New York by the public service commission. (*Pipe Line Cases*, 234 U. S. 548; *Manufacturers' Heat & Light Co. v. Ott*, 215 Fed. Rep. 940; *State ex rel. Caster v. Flannelly*, 96 Kan. 372; *Tax on Railway Gross Receipts*, 15 Wall. 293.) The Pennsylvania Gas Company is engaged in a public service at Jamestown which is subject to the regulation of the state of New York, limited only by the Fourteenth Amendment of the Federal Constitution and the bill of rights embodied in the State Constitution. (*Saratoga Gas Case*, 191 N. Y. 123; *People v. Budd*, 117 N. Y. 14; *Budd v. New York*, 143 U. S. 535.)

Louis L. Thrasher and *Robert H. Jackson* for Alfred C. Davis et al., respondents. In the absence of legislation by the Federal government the state has the right to regulate the price of natural gas brought into and sold within its territory. (*Oil Mfg. Co. v. Bd. of Agriculture*, 222 U. S. 380; *Wilson v. Blackbird Car, etc., Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound*

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v. *Turck*, 95 U. S. 459; *Simpson v. Shepard*, 230 U. S. 352; *M., K. & T. R. Co. v. Harris*, 234 U. S. 412; *Vandalia R. R. Co. v. P. S. Comm.*, 242 U. S. 255; *W. U. Tel. Co. v. City of Richmond*, 178 Fed. Rep. 310.) If the "original package rule" can be applied to the sale of natural gas, then under that rule the sale of the gas within the state, after its transportation is completed, is not interstate commerce. (*State ex rel. Caster v. Flannelly*, Kansas Pub. Util. Rep. 810; *Company v. Hardin*, 135 U. S. 128.) Regulation of the selling price of natural gas piped from one state to another is not of a character requiring uniform national legislation and hence is not within that class of cases where the states are prohibited from legislation, even though Congress has not acted. (*Jamieson v. Ind. N. G. & Oil Co.*, 128 Ind. 555.) State regulation of the selling price of gas piped in from another state infringes no province of Congress, is not a restriction upon interstate commerce in any sense, and is an appropriate exercise of a purely state function. (*Manufacturers L. & H. Co. v. Ott*, 215 Fed. Rep. 940.)

CARDOZO, J. The Pennsylvania Gas Company is a Pennsylvania corporation which supplies natural gas to the inhabitants of the city of Jamestown. Its gas fields and wells are in Pennsylvania, and its gas is conveyed to Jamestown through pipe lines. About forty-five miles of line are in Pennsylvania and about five in New York. It has a branch office in Jamestown, and its mains and pipes are in the city's streets. Formerly its rates for gas were thirty cents a thousand. Recently it attempted to raise its rates to thirty-five cents, and filed a schedule with the public service commission accordingly. A citizen of Jamestown, alleging that the new rates were exorbitant, lodged a complaint with the commission.

The gas company was directed to answer the complaint. It filed with the commission a demurrer to the jurisdiction which the commission overruled. Thereupon the company sued out a writ of prohibition. Its petition alleges that the attempted regulation of its rates is an unconstitutional interference with interstate commerce. The writ was granted at Special Term, and vacated at the Appellate Division. An appeal to this court followed.

(1) We think the petitioner's business is interstate commerce. There is no doubt that the transportation of oil or gas from state to state through the medium of pipe lines is commerce between the states (*West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; *Haskell v. Cowham*, 187 Fed. Rep. 403). It is true that there is a distinction to be noted. What is regulated by this statute (Public Service Commissions Law [Cons. Laws, chap. 48], sec. 65) is not, the act of transportation; it is the sale of the thing transported (*Manufacturers' Light & Heat Co. v. Ott*, 215 Fed. Rep. 940, 944). But the sale of commodities to be delivered by the seller in one state to the buyer in another is also interstate commerce (*Leisy v. Hardin*, 135 U. S. 100; *Savage v. Jones*, 225 U. S. 501; *Int. Paper Co. v. Mass.*, 246 U. S. 135). It is, therefore, subject, like the business of transportation, to the power of the nation. Interstate commerce does not end until the subject-matter of the sale has been broken up or redistributed or absorbed in the common mass of property within the state (*Leisy v. Hardin*, *supra*). When that moment arrives, is not always easy to determine. The test to be applied will vary with the method of transportation and the subject of the sale. The keg of beer transported from one state to another is withdrawn from interstate commerce when its contents are sold by the glass (*Leisy v. Hardin*, *supra*). Tobacco, imported in

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bulk, becomes subject to the plenary power of the states when the bulk is broken and the tobacco sold at retail (*Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 362; *Armour & Co. v. North Dakota*, 240 U. S. 510, 517). But the rule of the "original package" is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests (*Mutual Film Corp. v. Ohio Ind. Comm.*, 236 U. S. 230, 241; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 558). The telegram forwarded by the stock exchange in New York to the telegraph company in Boston, with the intention that the company shall transmit it to selected brokers, approved in advance by the exchange, does not lose its character as a subject of interstate commerce until it reaches the brokers' offices (*W. U. Tel. Co. v. Foster*, 247 U. S. 105). The continuity of the transaction is not broken by the translation of the code message into English; by its transmission, thus translated, to subscribers; or even by the option, reserved by the telegraph company, to refuse delivery to any one (*W. U. Tel. Co. v. Foster*, *supra*). The law does not ask itself what the parties *may* do, but what, in the normal course of business, it is expected that they *will* do. "If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages, or how little they are secured by covenant or bond" (*W. U. Tel. Co. v. Foster*, *supra*, at p. 113). The essential unity of the transaction remains the final test (*Swift & Co. v. U. S.*, 196 U. S. 375, 399; *Rearick v. Pennsylvania*, 203 U. S. 507, 512).

Subjected to that test, the transactions of the petitioner's business have the unity and directness of interstate commerce. There is no break in the continuity of the transmission from pumping station in

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Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage had been reached (*Kehrer v. Stewart*, 197 U. S. 60, 65; *Brown v. Houston*, 114 U. S. 622). The transactions would then be similar to those common in the oil business. We do not now determine the rule that should govern them. It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say, in the language of HOLMES, J., in *W. U. Tel. Co. v. Foster* (*supra*), that the transmission is "as continuous and rapid as science can make it."

(2) The question remains whether, in default of action by Congress, the attempted regulation is within the police power of the state.

The petitioner is a public service corporation. Its rates are subject to regulation by *some* agency of government. Congress has never occupied the field of regulation, as it has done with railroads, the telegraph and telephone lines, and even the oil companies (Act to Regulate Commerce, as amended June 29, 1906, ch. 3591, and June 18, 1910, ch. 309). Gas and water companies are expressly

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excepted. In such circumstances, there is no implied exclusion of the police power of the states. The exercise of that power is, indeed, subject to conditions. It must not impose upon interstate commerce burdens new and direct rather than remote and incidental (*Leisy v. Hardin*, *supra*; *Minnesota Rate Cases*, 230 U. S. 352, 396, 400). It must not discriminate against foreign products (*Brimmer v. Rebman*, 138 U. S. 78; *Minn. Rate Cases*, *supra*, at p. 401). It must not introduce diversity and conflict where there is need of uniformity and harmony (*Cooley v. Board of Wardens*, 12 How. [U. S.] 299, 319; *Wabash, St. L. & P. R. Co. v. Ill.*, 118 U. S. 557; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204; *Minn. Rate Cases*, *supra*, at p. 400). But subject to those conditions, the police power of the states survives, though the transactions brought within its grip are those of interstate commerce. Matters peculiarly of local concern are not "left to the unrestrained will of individuals because Congress has not acted" (*Minn. Rate Cases*, *supra*, at p. 402). "Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency" (*Minn. Rate Cases*, *supra*). No general formula can tell us in advance where the line is to be drawn. "We have no second Laplace, and we never shall have, with his *Mécanique Politique*, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision" (Daniel Webster in *Bank of Augusta v. Earle*, 13 Pet. 519, 559, quoted by Henderson, "The Position of Foreign Corporations in American Constitutional Law," p. 117).

We think the line must be drawn here so as to bring the attempted regulation within the power of the state. It is important to keep before us just what the state has

tried to do. The rule is stated in section 65 of the Public Service Commissions Law: "Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."

This gas company occupies the streets of Jamestown with its mains. Even without any statute, it would be under a duty to furnish gas to the public at fair and reasonable rates. The statute might be repealed, and still the courts would have the power, if exorbitant charges were made, to give relief to the consumer (1 Wyman, Public Service Corporations, secs. 111, 113; *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 408; *Armour Packing Co. v. Edison El. Ill. Co.*, 115 App. Div. 51; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539). The state in the adoption of this law has not imposed a new burden. It has not created a new duty. It has given a new "sanction" to "an inherent duty" (*W. U. Tel. Co. v. Commercial Milling Co.*, 218 U. S. 406, 416). It has established a new administrative agency the better to ascertain and declare and enforce a duty already existing. We cannot doubt that the creation of such an agency is within the power of the state until Congress shall manifest the purpose to override its action (*W. U. Tel. Co. v. Comcl. Milling Co.*, *supra*; *Mo., K. & T. Ry. Co. v. Harris*, 234 U. S. 412; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 437;

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Missouri Pac. Ry. Co. v. Larrabee Flour Mills Co., 211 U. S. 612, 623; *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285; *N. Y. & N. H. R. R. Co. v. N. Y.*, 165 U. S. 628; *Chicago, R. I. & P. Ry. Co. v. Arkansas*, 219 U. S. 453; *Int. & Gt. No. Ry. Co. v. Anderson County*, 246 U. S. 424). Nothing to the contrary was held in *W. U. Tel. Co. v. Foster* (*supra*). There is a twofold distinction. The regulation there condemned was one that affected telegraph companies in a field already occupied by the statutes of the nation (Act to Regulate Commerce, as amended June 18, 1910), and it imposed a new duty instead of enforcing an old one (247 U. S. at p. 114).

In thus holding, we do not forget that the state, in the exercise of its police power, must not introduce diversity and conflict in spheres where there is need of uniformity and harmony. That is the reason why, irrespective of any occupation of the field by Congress, it may not fix the rates of interstate transportation. It may not do this, even though it confines its action to that part of the interstate journey within its own limits. The law in that respect has been undoubted since the decision in *Wabash, St. L. & P. R. Co. v. Ill.* (118 U. S. 557). A statute of Illinois prescribed that there should be no greater charge for a short haul than for a long one. In condemning the statute, the court emphasized the need of uniform regulation. If each state prescribed different rates for different portions of the trip, the result would be chaos. Again in the *Covington Bridge* case (*Covington & Cinn. Bridge Co. v. Kentucky*, 154 U. S. 204), the decision had a like basis. A bridge lay between two states. One state attempted to fix a charge. The court said that if one state could fix one charge, the other could fix another; and again the result would be chaos. On the other hand, the question was left open whether the two states, in default of action by Congress, might establish a joint

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tariff (154 U. S. at p. 222). These cases are taken as typical of many others. The principle back of them has been often stated. "As to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive" (*Minn. Rate Cases, supra*, at p. 399). As to "other matters, admitting of diversity of treatment according to the special requirements of local conditions," there is a reserved power in the states, subject, in its exercise, to the overriding power of the nation. "Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation," is not a denial, but a concession of the power of the vicinage (*County of Mobile v. Kimball*, 102 U. S. 691, 699; *Transp. Co. v. Parkersburg*, 107 U. S. 691, 703). Familiar illustrations are regulations of the fees of pilots (*Cooley v. Board of Wardens*, 12 How. [U. S.] 299, 319), charges for the use of wharves (*Transp. Co. v. Parkersburg, supra*; *Minn. Rate Cases, supra*, at p. 405), and tolls for the use of natural waterways, which have been artificially improved (*Sands v. Manistee River Imp. Co.*, 123 U. S. 288). Dicta may, indeed, be quoted where the court, in sustaining police regulations, has observed, as if by way of contrast, that they did not involve the regulation of rates (*Chicago, M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133; *W. U. Tel. Co. v. Coml. Milling Co.*, *supra*, p. 418). But in every case the rates in view were rates of transportation. That is a field where regulation, if there is to be any, must be uniform. A central authority must reconcile the clashing action of localities. What is within the police power of one state is equally in such circumstances within the police power of its neighbor. One cannot freely exercise its will without affecting at the same time the like freedom of another. In the phrase of Hobbes, there is need of "a common power to keep them in awe."

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We deal here with a different situation. There is here no regulation of transportation (*Mfrs.' Light & Heat Co. v. Ott*, 215 Fed. Rep. 940, 944). There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service (*Gibbs v. Baltimore Gas Co.*, *supra*; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 639). The service is due to the state from which the privilege proceeds. Until Congress shall intervene, it is, therefore, the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania. There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial waterways. In these matters, protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but until displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority, for clashing regulations. The statute has a sphere of operation that is not national, but local (*Cooley v. Bd. of Port Wardens*, *supra*). It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state, diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them.

The case comes, then, to this: We have a sale of a

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single commodity. We have a pre-existing duty to sell it at fair rates. We have a transaction where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of Congress cannot be interpreted as a declaration that public service corporations, serving the needs of the locality, may charge anything they please (*County of Mobile v. Kimball, supra; Transportation Co. v. Parkersburg, supra; Covington Bridge Case, supra, p. 222*). The local regulation stands until Congress occupies the field.

The order should be affirmed with costs.

HISCOCK, Ch. J., CHASE, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Order affirmed.

ALFRED F. GEORGI, Respondent, v. THE TEXAS COMPANY,
Appellant.

Election of remedies — principal and agent — sale of goods to an agent of an undisclosed principal — attempt to recover value of goods from agent after seller has knowledge of all the facts of the agency.

The question of election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice: When a person sells goods to another who is in fact an agent of an undisclosed principal, he may upon discovery of the principal resort to him or to the agent, at his election, but if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal. When such creditor after all the facts have become known to him obtains a judgment against the agent, it is an election to resort to the agent to whom the credit was originally given and is a bar to an action against the principal.

Georgi v. Texas Co., 173 App. Div. 809, reversed.

(Argued January 14, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 14, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

The nature of the action and the facts, so far as material, are stated in the opinion.

I. R. Oeland, H. E. J. MacDermott and James L. Nesbitt for appellant. Plaintiff's assignor, knowing the name and identity of the principal, took judgment against the agent. The plaintiff cannot now have judgment. (*Drennan v. Boice*, 19 Misc. Rep. 641; *Tuthill v. Wilson*, 90 N. Y. 423; *Kingsly v. Davis*, 104 Mass. 178; *Ideal Concrete Co. v. Bank*, 159 App. Div. 344; *Weil v. Raymond*, 142 Mass. 206; *Matlage v. Poole*, 15 Hun, 556; *Barrell v. Newby*, 127 Fed. Rep. 656; *Brennin v. Thompson*, 33 Ont. L. R. 465; *Ranger v. Thallman*, 65 App. Div. 9.)

Nathan D. Stern for respondent. The direction of a verdict in plaintiff's favor by the trial court was not error. It appears without contradiction, *first*, that plaintiff's assignor did not have full knowledge of all the facts when it entered into judgment against the agent and proved its claim in bankruptcy; *second*, that defendant misstated the situation to plaintiff's assignor when called upon to state the facts. Under such circumstances the entry of the judgment and proof of the claim in bankruptcy was not an election which released defendant. (*Meeker v. Claghorn*, 44 N. Y. 349; *Coleman v. First Nat. Bank*, 53 N. Y. 388; *Cobb v. Knapp*, 71 N. Y. 348; *Sweeney v. Douglas Copper Co.*, 149 App. Div. 568; *Rommel v. Townsend*, 83 Hun, 353; *Brown v. Reiman*, 48 App. Div. 295; *Knickerbocker Biscuit Co. v. Devoe*, 81 Misc. Rep. 1; *Merrill v. Pacific Transfer Co.*, 131

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Cal. 582; *Iron S. M. Co. v. Reynolds*, 124 U. S. 374; *Cleveland Woolen Mills v. Siebert*, 81 Ala. 140; *Atlas S. S. Co. v. Columbia Land Co.*, 102 Fed. Rep. 358.)

CRANE, J. This appeal touches upon the rule of election as between principal and agent for the recovery of goods sold. There is no misunderstanding about the law which is well settled by many authorities, but the difficulty has been its application to the facts of this case. Where goods have been sold to an agent whose agency and principal were not known and the claim has been prosecuted to a judgment, a recovery may nevertheless be had against the actual principal when the facts are disclosed. If, however, the creditor proceeds against the agent after full knowledge of the agency and recovers a judgment, an action may not thereafter be maintained against the principal. The election to recover from the agent is then a bar to other proceedings.

The question of election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice. (*Lindquist v. Dickson*, 98 Minn. 369.) Knowledge of the right to recover from the principal is essential before suit against the agent may be regarded as an election to look to the latter, alone, for payment. Without knowing who the principal is or the fact of agency, an intelligent election is impossible. (*Steele Smith Grocery Company v. Potthast*, 109 Iowa, 413.) When a person contracts with another who is in fact an agent of an undisclosed principal, he may upon discovery of the principal resort to him or to the agent with whom he dealt, at his election, but if after having come to a knowledge of all the facts he elects to hold the agent, he cannot afterwards resort to the principal. When a creditor after all the facts have become known to him obtains a judgment against the agent, this is an election to resort to the agent to whom the credit

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was originally given and is a bar to an action against the principal. (*Kingsley v. Davis*, 104 Mass. 178.)

The following authorities also justify this statement of the rule: *De Remer v. Brown* (165 N. Y. 410); *Knapp v. Simon* (96 N. Y. 284, 286); *Tuthill v. Wilson* (90 N. Y. 423); *Cobb v. Knapp* (71 N. Y. 348); *Coleman v. First National Bank of Elmira* (53 N. Y. 388); *Meeker v. Claghorn* (44 N. Y. 349); *Sweeney v. Douglas Copper Company* (149 App. Div. 569); *Rommel v. Townsend* (83 Hun, 353); *Barrell v. Newby* (127 Fed. Rep. 656).

As I have said, the law is well settled and understood, but its application to the facts of this case has led to a division in the court below. Doubt only arises as to one point and that is whether the plaintiff's assignor had full knowledge of the facts entitling it to recover against the principal when it pursued its remedy and obtained judgment against the agent. The facts briefly are these:

The Standard Paint Company of New Jersey in March, 1914, sold to the American Oil Cloth Company of the same state saturated felt for the sum of \$2,399.91. In July, 1914, it brought action in the Supreme Court of New Jersey against the purchaser for the price and recovered judgment on the 13th day of October, 1914, for the full amount thereof. Execution was issued and returned unsatisfied. The judgment debtor was thereafter adjudicated a bankrupt in the District Court of the United States for the Southern District of New York, and the Standard Paint Company in March, 1915, filed its proof of claim for its debt existing upon said judgment.

The American Oil Cloth Company when it purchased the goods from the Standard Paint Company in March, 1914, was acting as agent for the defendant in this action, the Texas Company. Its authorization to make the purchase was contained in the following letter:

" THE TEXAS COMPANY

" Petroleum and Its Products

" SALES DEPARTMENT

" C. E. Woodbridge, Manager.

" NEW YORK, *March 12th*, 1914.

" AMERICAN OIL CLOTH COMPANY,

" 262 Canal Street,

" New York City:

" DEAR SIRs.—Referring to conversation between Mr. Bimberg and the writer today, you may purchase for our account from the Standard Paint Company:

" Five or six carloads of saturated felt weighing two and one-half pounds per square yard, each carload to contain about three hundred rolls; price seven cents per square yard, f. o. b. your plant at Salem, N. J.; for shipment between date and March 25th, to April 1st.

" I understand it will be necessary to have the material billed to the American Oil Cloth Company.

" Please arrange to have bills sent to you after the same have been approved as to quality and quantity by the Salem Works, and have them handed to us for payment.

" We will bill the goods to the American Oil Cloth Company pursuant to our contract with you for saturated felt.

Very truly yours,

" THE TEXAS COMPANY

" CEW/LBW

By C. E. WOODBRIDGE."

When sued as above stated in the Supreme Court of New Jersey, the American Oil Cloth Company filed an answer in which it pleaded that the goods were ordered in the name of and to be charged to the account of the Texas Company by its written authorization.

Louis J. Bimberg was secretary and treasurer of the American Oil Cloth Company at the times in question. In this action he was called as a witness for the plaintiff and testified that he brought the above letter and handed

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it to the attorneys for the Standard Paint Company in September of 1914. Felix Jellenik, one of the attorneys, was also its secretary in that year. Bimberg also stated that he mentioned this fact about the Texas Company after the sale of the merchandise when payment was demanded.

On September 29th, 1914, the attorneys for the paint company wrote the following letter to the Texas Company, demanding payment for the goods sold to the American Oil Cloth Company:

" JELLENIK & STERN,

" Counsellors at Law,

" 111 Broadway, New York

" FELIX JELLENIK

" NATHAN D. STERN.

September 29, 1914.

" THE TEXAS COMPANY,

" 17 Battery Place,

" City:

" GENTLEMEN.— Our client, the Standard Paint Company, has placed in our hands for collection a claim against you amounting to \$2,417.13, being for saturated felt sold and delivered to the American Oil Cloth Co., in which transaction you undoubtedly acted as the undisclosed principal of that Company, of which fact we have just become aware. We beg to refer you to your letter of March 12, 1914, addressed to the American Oil Cloth Company, the original of which has just come into and is now in our possession.

" Our instructions are to commence suit to recover the above amount unless we receive a check without delay. We shall await your check until Thursday, the 1st of October, failing which you will leave us no alternative but to commence suit.

" Very truly yours,

" JELLENIK & STERN."

By this letter we learn that on September 29th, 1914, the attorneys and the secretary for the Standard Paint Company had full information regarding the agency of the American Oil Cloth Company for the Texas Company and that the saturated felt had been ordered by the express direction and authorization of the latter company. In fact the Standard Paint Company had in its possession the original letter of March 12th, 1914, written by the Texas Company to the American Oil Cloth Company.

The reply sent by the Texas Company on September 30th, 1914, to the attorneys for the Standard Paint Company, while refusing to pay the bill, did not in any way deny the agency. Quite clearly it appears, therefore, that by October 1st the Standard Paint Company had knowledge of all the facts regarding the relationship between the Texas Company and the American Oil Cloth Company. In fact it had in its possession, as above stated, the written direction to the agent to buy the goods and have the bills handed to it, the Texas Company, for payment. No other fact regarding the Texas Company's liability has come to the knowledge of the Standard Paint Company which it did not have by October 1st, 1914. When this action was commenced against the principal, it knew as much, but no more than it knew on said date. In fact there is no claim made in this case that the company or its assignor, the plaintiff, was led to sue the principal because of anything discovered after October 1st, 1914.

And yet with possession of all the facts, and with full knowledge of the relationship, the creditor pursued its remedy against the agent and on October 13th, 1914, recovered judgment, issued execution thereon and in March, 1915, filed its claim in bankruptcy against the assets of the corporation.

It may seem, and in fact is a hard situation in which

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the vendor is placed. It has sold goods to a bankrupt and the principal, who ordered them, is financially able to pay therefor. There is, however, much virtue in this rule of election; it serves a good purpose, is well known and has become firmly embedded in our procedure by the many decisions in this and other states.

The plaintiff, therefore, by reason of his assignor's action in determining to follow the agent for the purchase price instead of the principal after having full knowledge of all the facts is barred upon the evidence here presented from recovering in this action against this defendant.

The judgment, therefore, for the plaintiff as affirmed by the Appellate Division should be reversed and the complaint dismissed, with costs in all courts.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ., concur.

Judgment reversed, etc.

LEVI S. CHAPMAN, Respondent, v. GRANT SELOVER,
Appellant.

Villages — misdemeanor — motor vehicles — incorporated villages may by ordinance limit the speed of automobiles and provide that violation of ordinance is a misdemeanor punishable by a fine and imprisonment if fine is not paid — false arrest — action for false arrest of person violating such an ordinance cannot be maintained.

1. The state, when it punishes misdemeanors by fine, is not confined to the remedy of a civil action for a penalty. (Code Civ. Pro. § 1962.) The offender who refuses to pay may be imprisoned until the fine is satisfied, subject to the condition that the imprisonment may not exceed one day for every dollar of the fine. (Code Crim. Pro. §§ 484, 718.)

2. Under the Highway Law (Cons. Laws, ch. 25, §§ 287, 288, 290) an incorporated village may by ordinance limit the speed of automobiles in the village to fifteen miles an hour and provide that a violation of the ordinance is a misdemeanor punishable by a fine not exceeding that prescribed by subdivision 2 of section 290, and if the fine be not

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paid the offender may be imprisoned. Hence a person arrested for violation of such ordinance cannot maintain an action for false arrest against the officer who arrested him upon the ground that the village authorities have no power to enforce the ordinance except under the Village Law (Cons. Laws, ch. 64, § 93), and, therefore, have power only to prescribe a penalty for a violation of the ordinance.

Chapman v. Selover, 172 App. Div. 858, reversed.

(Argued January 17, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 8, 1916, reversing a judgment in favor of defendant entered upon a verdict and granting a new trial.

The nature of the action and the facts, so far as material, are stated in the opinion.

G. W. O'Brien and *Cleveland J. Kenyon* for appellant. The board of village trustees was authorized by statute to adopt the ordinance in question, and the provisions of the statute authorizing its adoption were complied with in all respects. (L. 1910, ch. 374, § 288; *People v. Chapman*, 88 Misc. Rep. 469; *People v. Stevens*, 13 Wend. 341; *People v. Snyder*, 90 App. Div. 422; *People v. Meakim*, 133 N. Y. 214; *People ex rel. Hainer v. Keeper*, 190 N. Y. 315; *People v. Bell*, 148 N. Y. Supp. 753.)

Harry E. Newell for respondent. The ordinance adopted by the village was void and the trial court correctly charged that the violation thereof was not an offense. (Cons. Laws, ch. 25, § 280; *People v. Knapp*, 206 N. Y. 373; *People v. Chapman*, 88 Misc. Rep. 469; *People v. City of Buffalo*, 93 Misc. Rep. 275; 175 App. Div. 218; 220 N. Y. 715; *People v. State Reformatory*, 38 Misc. Rep. 241; *People v. Keeper, etc.*, 38 Misc. Rep. 233; *People v. Garabed*, 20 Misc. Rep. 127; *Fuller v. Redding*, 16 Misc. Rep. 634; *People ex rel. Kane v.*

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Sloane, 98 App. Div. 450; *Hattenbach v. N. Y. C. & H. R. R. Co.*, 18 Hun, 129; *City of Buffalo v. Schliefer*, 25 Hun, 272; *People v. Garabed*, 25 App. Div. 624.)

CARDOZO, J. The action is for false arrest. On July 19, 1914, the plaintiff drove his automobile in the village of Tully, Onondaga county, at a greater rate of speed than fifteen miles an hour. He was arrested, without a warrant, by a police officer of the village. A village ordinance regulating motor vehicles establishes a speed limit of a mile in four minutes, and provides that offenders shall be guilty of a misdemeanor, punishable by a fine not exceeding \$50. The validity of this ordinance is the question to be determined.

Section 287 of the Highway Law (Consol. Laws, chap. 25) requires "every person operating a motor vehicle on the public highway of this state" to "drive the same in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person." It adds that "a rate of speed in excess of thirty miles an hour for a distance of one-fourth of a mile shall be presumptive evidence of driving at a rate of speed which is not careful and prudent." Section 290, subdivision 2, provides that "the violation of any of the provisions of section 287 of this article shall constitute a misdemeanor punishable by a fine not exceeding \$100." Section 288 withdraws from the local authorities the power to adopt ordinances inconsistent with the statute, but provides "that nothing in this article contained shall impair the validity or effect of any ordinances, regulating the speed of motor vehicles, * * * in any city of the first class or in any city of the second class in a county adjoining a city of the first class," and provides also that "the local authorities of other cities and incorporated villages may limit by ordinance, rule or regulation the speed of motor vehicles on the public highways,

such speed limitation not to be in any case less than one mile in four minutes," on condition, however, that a prescribed sign be displayed by way of warning to travelers, and "also on further condition that such ordinance, rule or regulation shall fix the punishment for violation thereof, which punishment shall, during the existence of the ordinance, rule or regulation, supersede those specified in subdivision 2 of section 290 of this chapter, but, except in cities of the first or second class shall not exceed the same." The Appellate Division held that under this section the village authorities are empowered to punish offenders by fines, but not to declare the offense a misdemeanor. The ordinance, it was held, has no other sanctions than those attached to village ordinances generally by section 93 of the Village Law (Consol. Laws, chap. 64). That section provides that "the board of trustees of a village may enforce obedience to its ordinances by prescribing therein penalties for each violation thereof, not exceeding \$100 for any offense," and "in addition to the penalty the board may also ordain that a violation thereof shall constitute disorderly conduct." Violation of this ordinance is not disorderly conduct, for the ordinance does not so declare it, and so it is said that the only remedy available is a civil action for the penalty (Village Law, sec. 339).

We think the power of the local authorities has been too narrowly construed. A speed that is safe in the open country may be dangerous in cities and villages. The purpose of the legislature, in its delegation of the ordinance power, was not to relax in such localities the rules of the road. It was to make them more rigid. We should be slow to construe the statute as making excessive speed a misdemeanor in districts where the danger is slight, and in denying to it a like quality where the danger is great. Its language does not force us to a construction so unreasonable (*Matter of Meyer*, 209 N. Y. 386). Sec-

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tion 290 of the Highway Law has the heading "punishment for violation." Its subdivisions cover violations of many kinds. In some subdivisions (as in subdivision 2), violation is declared a misdemeanor punishable by fine. In others (as in subdivisions 3, 4, 5 and 9), it is declared a misdemeanor punishable by fine or imprisonment or both. In all alike, the definition of the violation as a misdemeanor affects the punishment imposed. The state when it punishes misdemeanors by fine, is not confined to the dubious remedy of a civil action for a penalty (Code Civ. Pro. sec. 1962). The offender who refuses to pay may be imprisoned until the fine is satisfied, subject to the condition that the imprisonment may not exceed one day for every dollar of the fine (Code Crim. Pro. secs. 484, 718; *Colon v. Lisk*, 13 App. Div. 195, 204, 205; *affd.*, 153 N. Y. 188). The punishment is not solely the liability for a debt. The punishment includes the consequences that follow upon default. The law defines the consequences when it classifies the offense.

The statute gives the local authorities the power to fix the punishment for violation of the local rule. The power to fix the punishment is something more than the power, when declaring the rule, to fix the measure of the fine. It is the power to prescribe the sanctions that shall render the rule effective. It is broad enough to cover all the penal consequences of the offense. The punishment may not exceed "those specified in subdivision 2 of section 290." By implication it may equal them. It may include the remedies and sanctions inherent by force of statute in the definition of a crime.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs in the Appellate Division and in this court.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, POUND, CRANE and ANDREWS, JJ., concur.

Order reversed, etc.

MARGARET TIDD, Respondent, v. C. B. SKINNER et al.,
Doing Business under the Name of C. B. SKINNER
& COMPANY, Appellants.

Parent and child — Public Health Law — sale of heroin to infant in violation of statute — when mother dependent upon earnings of minor son can maintain action against druggists who sold heroin to him whereby his health was ruined and his services lost — compensatory damages, only, can be recovered — punitive damages not allowed in common-law action by third person.

1. The right of a parent to recover for loss of services of an infant child has long been recognized at common law, and while it is a general rule that damages will not be permitted if the evidence shows that the child's negligence was the efficient cause of the injury, yet if the conduct of the defendant in such a case was so deliberate, persistent and intentional as to be equivalent in law to positive and willful injury the contributory negligence of the child is not a defense.

2. This action is brought by a widow to recover damages for loss of the services of her son, which she alleges were caused by the defendants by the sale to him of heroin which is a poison within the provisions of the Public Health Law (Cons. Laws, ch. 45, § 238) as it existed prior to the amendment by chapter 502 of the Laws of 1915. The statute also prohibits the delivery of the poison by the seller without satisfying himself that the purchaser is aware of its poisonous character and that the poison is to be used for a legitimate purpose. A violation of this provision is a misdemeanor. (Penal Law, § 1743.) The defendants failed to obey these statutes by selling the drug to plaintiff's son in large quantities, knowing that heroin, except as a medicine used in very small quantities and under the direction of a physician, is a poison dangerous to human life. The facts alleged in the complaint and which the jury might have found from the evidence justify a verdict for the plaintiff.

3. As to several exceptions to the charge, refusals to charge and modifications of defendants' requests to charge, they must be read with all that was said by the court in connection therewith and with the facts necessarily found by the jury. As so read no question of controlling importance is presented.

4. The court directed the jury that in case they found a verdict for the plaintiff they should find separately as to the compensatory

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damages and as to the punitive damages. The defendants raised the question that punitive damages could not be awarded. *Held*, that the weight of reason and authority is in favor of confining the damages to be recovered in an action by a third party to compensation for the pecuniary injury actually sustained. Hence, the judgment is modified by reducing the amount of the recovery to the amount found for compensatory damages.

Tidd v. Skinner, 171 App. Div. 98, modified.

(Argued October 21, 1918; decided January 28, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 6, 1916, unanimously affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts, so far as material, are stated in the opinion.

Christopher J. Heffernan for appellants. The plaintiff did not establish any cause of action against the defendants. (*Westbrook v. Miller*, 98 App. Div. 590.) The trial judge clearly erred in his charge to the jury, in his refusal to charge defendants' requests and erroneously instructed the jury on the question of damages. (*Whitney v. Hitchcock*, 4 Den. 461; 1 Sedgwick on Dam. [9th ed.] 687, 710, 733; *Craven v. Bloomingdale*, 171 N. Y. 439; *Curl v. C., R. I. & P. Ry. Co.*, 63 Iowa, 417; *New Orleans, J. & G. N. R. Co. v. Stathan*, 42 Miss. 607; *C. & N. W. Ry. Co. v. Jackson*, 55 Ill. 492; *L., N. A. & C. Ry. Co. v. Wurl*, 62 Ill. App. 381.)

Frank Cooper and *J. J. Barry* for respondent. Plaintiff clearly established a substantial cause of action for the wrongful acts of the defendants. (*Maxson v. D., L. & W. R. R. Co.*, 112 N. Y. 559; *Riddle v. MacFadden*, 201 N. Y. 215; *Bennett v. Bennett*, 116 N. Y. 584; *Gorlitzer v. Wolfberger*, 208 N. Y. 475; *Hoard v. Peck*, 56 Barb. 202; *Hillman v. Howard*, 119 N. C. 119;

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Flaudemeyer v. Cooper, 31 Ohio, 402; *Lawyer v. Fritcher*, 130 N. Y. 239; *Hewit v. Prime*, 21 Wend. 79; *White v. Nellis*, 31 N. Y. 405; *Ingerson v. Miller*, 47 Barb. 47; *Badgley v. Decker*, 44 Barb. 588.) There was no error committed in the trial court's charge to the jury nor in his refusal to charge appellants' requests. The amount of compensatory damage was amply justified by the evidence, and punitive damages supported by authority. (*Lawyer v. Fritcher*, 130 N. Y. 239; *Ingerson v. Miller*, 47 Barb. 47; *Badgley v. Decker*, 44 Barb. 577; *Hamilton v. Lomax*, 26 Barb. 617; *Holmes v. James*, 147 N. Y. 67; *Reid v. Terwilliger*, 116 N. Y. 530; *Colwell v. Tinker*, 169 N. Y. 535; *P., W. & B. R. R. Co. v. Quigley*, 62 U. S. 203.)

CHASE, J. This action is brought by a widow to recover damages for loss of the services of her son, which she alleges was caused by the defendants as herein stated. The defendants at the times herein mentioned were druggists of experience engaged in conducting retail drug stores, one of which was in the city of Amsterdam. The plaintiff at the times herein mentioned lived in the city of Schenectady. She had a son who at eighteen years of age was of good physique and fair ability. He lived with his mother and was employed by others at remunerative wages. The mother, except for the aid of the son, was dependent upon her labor to maintain her household. The son was kind, helpful and obedient to his mother and brought to her all or a substantial part of his earnings. About that time and within four or five weeks before January 1, 1912, he was given fifteen or twenty tablets, each containing from one-twelfth to one-eighth of a grain of heroin, by a boy friend. During that time he used these tablets, and he testified, "I felt like I wanted it. I liked it."

Heroin is a derivative of morphine. It is a poison within

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the provisions of the Public Health Law (Cons. Laws, ch. 45) as it existed at the times herein mentioned. (Public Health Law, sec. 238, as it existed prior to the amendment of chapter 502 of the Laws of 1915.) The statute referred to provided: "It is unlawful for any person to sell at retail or to furnish any of the poisons of schedules A and B (schedules A and B as contained in section 241 of the Public Health Law) without affixing or causing to be affixed to the bottle, box, vessel or package, a label with the name of the article and the word poison distinctly shown and with the name and place of business of the seller all printed in red ink together with the name of such poisons printed or written thereupon in plain, legible characters."

It also provided: "Every person who disposes of or sells at retail or furnishes any poisons included in schedule A shall before delivering the same enter in a book kept for that purpose the date of sale, the name and address of the purchaser, the name and the quantity of the poison, the purpose for which it is purchased and the name of the dispenser. The poison register must be always open for inspection by the proper authorities and must be preserved for at least five years after the last entry. He shall not deliver any of the poisons of schedule A or B until he has satisfied himself that the purchaser is aware of its poisonous character and that the poison is to be used for a legitimate purpose." Any person who violates any of the provisions of the Public Health Law mentioned is guilty of a misdemeanor. (Penal Law, sec. 1743.)

The defendants at all the times mentioned knew of the existence of the statutes relating to the sale of poisons. The jury could have found from the evidence that about January 1, 1912, plaintiff's son went to Amsterdam from Schenectady and endeavored to purchase heroin of the defendants, but was asked if he had purchased it of them before, and when he answered in the negative was told that they could not sell it to him. Soon thereafter he went again to Amsterdam, and to the defend-

ants' store. His boy friend was with him, and his friend said to one of the defendants that he (plaintiff's son) "Was all right if he wanted to buy any heroin." Thereafter, and on the same day, plaintiff's son went alone to the defendants and purchased from them two hundred tablets. From that time until he became twenty-one years of age, a period of between two and three years, he purchased of the defendants, except during the times when he was in a hospital or confined under criminal process, more than three hundred tablets per week. One week he purchased of them one thousand tablets. Each of the tablets so purchased contained either one-twelfth or one-eighth of a grain of heroin. During a part of the time plaintiff's son personally pulverized and inhaled seventy-five to one hundred tablets per day. He became a physical wreck. He not only abandoned his work, but he pawned his clothing and also carpets, rugs and furnishings from his mother's home to obtain money to buy the drug. At the time of the trial he was brought as a witness from the county jail where he was serving a term for petit larceny.

The defendants wholly failed to obey the statutes quoted, knowing that heroin, except as a medicine used in very small quantities and under the direction of a physician, is a poison dangerous to human life.

The jury could have found that one of the defendants stated to the plaintiff's son that he should be careful not to let any one know that he was getting heroin at the defendant's store, as it might make trouble for them. They could also have found that the change in the habits and physical condition of plaintiff's son, and his consequent conduct and general incapacity, were the results of the use of heroin purchased of the defendants; that in selling it to him as stated they knew that he was making an improper use of it, and that its use was injuriously affecting his health, and that their conduct in the repeated

sales to him in the manner and to the extent as shown was reckless and equivalent in law to willful injury. Upon the facts necessarily found in this case the sales were entirely different from those ordinarily made by a druggist at the request of a customer.

The jury found for the plaintiff and an appeal was taken from the judgment entered upon their verdict to the Appellate Division where the judgment was unanimously affirmed, the court expressly stating in its opinion that the verdict was not against the weight of evidence and that "the proof does abundantly establish * * * that the defendants were wholly reckless of the rights of others." The judgment of the trial court entered upon the verdict of the jury having been unanimously affirmed by the Appellate Division it is on this appeal incontrovertibly established that the facts presented at the trial sustain the verdict. (Constitution, art. 6, sec. 9; Code of Civil Procedure, sec. 191.) The judgment must be sustained by this court unless error was committed in the rulings upon the admission or rejection of evidence or in the charge by the court to the jury.

Numerous questions are presented to us by the appellants arising from rulings of the court upon objections to the receipt of evidence during the trial. The appellants claim that the court erred in receiving evidence to show that the plaintiff's son had taken carpets and rugs from the floor of her home and pawned them and also to show his other efforts to obtain money to purchase heroin. We do not think that the court erred in the rulings mentioned. It was a part of the history of the son during the time mentioned, and tended to show the dominating influence that heroin had over his time and his thought as it affected his time, and the consequent loss of his services to his mother.

There were no exceptions taken to the main charge of the court except those relating to punitive or vindictive

damages. The only exceptions taken by the defendants to their request to charge made at the close of the main charge other than those relating to punitive or vindictive damages hereinafter referred to, were taken in connection with other statements and charges by the court, all of which we quote as follows:

"Mr. Heffernan: I ask your Honor to charge that the defendants had a legal right to sell and offer for sale heroin between the first day of January, 1912, and the first day of July, 1914, without the direction or prescription of a physician on complying with the terms of the statute as to registering it and labeling it.

"The Court: I will charge the jury that at the time of the sales in question, if there were such sales, there was no statute of the state which prohibited the sale by these defendants of the drug known as heroin without a doctor's prescription and I also charge the jury that cases can arise where the sales are so excessive and made with such purpose that a civil action will lie for damages resulting from such sales, in which case the sales could not be termed rightful.

"Mr. Heffernan: The defendants except to your Honor's modification. I ask your Honor to charge the jury that in order to find a verdict for the plaintiff the jury must be satisfied from the evidence that the defendants sold heroin to Rooney knowing that Rooney was making an improper use of it and that its use was injuriously affecting his health.

"The Court: I so charge.

"Mr. Heffernan: I ask your Honor to charge the jury that there is no evidence in this case upon which the jury can find that the defendant knew or had reason to know that Rooney's health was being injuriously affected by heroin.

"The Court: I decline to charge that on the ground that the defendant was a pharmacist and from his position

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as a pharmacist the jury might infer that he had knowledge of the drug heroin and of its consequences and also from the size of the doses claimed to have been sold.

" Mr. Heffernan: We except to your Honor's modification. I ask your Honor to charge that if the defendants between January 1st, 1912, and June, 1914, sold heroin in the ordinary course of business to Rooney or to others on their application, the defendants are not liable for the improper use of it made by the purchasers.

" The Court: For improper use made by the purchasers?

" Mr. Heffernan: Yes.

" The Court: Refused.

" Mr. Heffernan: I except to that. I ask your Honor to charge that there is no evidence in this case that the defendants knew or had reason to know that Rooney was not using heroin in a proper or lawful manner.

" The Court: I will refuse to charge that on the ground that there is proof in this case to the effect that the use of 500 tablets of heroin a week is not known for medical purposes.

" Mr. Heffernan: I except to your Honor's statement. I ask your Honor to charge that there is no evidence in this case that the defendants wrongfully, unlawfully, or by acts or words requested, solicited or induced the plaintiff's son to enter their store or to purchase or use heroin.

" The Court: I charge that there is no evidence of active inducement of the son of the plaintiff to enter the store of the defendants and acquire the drug habit.

" Mr. Heffernan: Now I ask your Honor to charge that there can be no recovery by the plaintiff here unless the defendants or either of them requested, solicited, or induced Rooney to enter their store, for the purpose of selling or giving to him heroin.

" The Court: Refused.

" Mr. Heffernan: Except. I ask your Honor to charge that if the jury find that Rooney had become addicted to the use of heroin before he claims he made his first purchase from the defendants, then the jury's verdict must be no cause of action.

" The Court: I so charge."

It will be seen from the above quotation that the defendants took but five exceptions. The first exception followed a charge by the court in accordance with the defendant's request in which the jury were told " that at the time of the sales in question, if there were such sales, there was no statute of the state which prohibited the sale by these defendants of the drug known as heroin without a doctor's prescription," but the court added: " Cases can arise where the sales are so excessive and made with such purpose that civil action will lie for damages resulting from such sales in which case the sales could not be termed rightful." It was not error to leave the jury to consider the purpose and extent of the sales. The purpose and extent of the sales were questions of fact. Heroin being a poison the purpose and extent of the sales were proper subjects of consideration in the action.

The second exception was after the court had charged at the defendants' request that the jury *must be satisfied that the defendants sold heroin to plaintiff's son knowing that he was making an improper use of it and that the use was injuriously affecting his health* and the defendants had made a further request that the court charge the jury " That there is no evidence in this case upon which the jury can find that the defendant knew or had reason to know that Rooney's health was being injuriously affected by heroin." The modification by the court to which the exception was taken is in words as follows: " The defendant was a pharmacist and from his position as a pharmacist the jury might infer that he had knowledge

of the drug heroin and of its consequences and also from the size of the doses claimed to have been sold." The defendants' knowledge of the drug heroin was established. The modification was not error.

The third exception was to the refusal of the court to charge "That if the defendants between January 1st, 1912, and June, 1914, sold heroin in the ordinary course of business to Rooney or to others on their application the defendants are not liable for the improper use of it by the purchasers." The charge so far as it relates to sales to others than Rooney was immaterial and the sale to Rooney could not be disassociated from the facts and circumstances affecting such sales. The court had charged that in order to find a verdict the jury must be satisfied that defendants sold the heroin to Rooney knowing that he was making an improper use of it and that its use was injuriously affecting his health.

The fourth exception was to the refusal of the court to charge the jury "that there is no evidence in this case that the defendants knew or had reason to know that Rooney was not using heroin in a proper or lawful manner." The court did charge in connection with such refusal that his refusal was "on the ground that there is proof in this case to the effect that the use of five hundred tablets of heroin a week is not known for medical purposes." This exception does not present a question of law.

The fifth exception was to the refusal to charge that "there can be no recovery by the plaintiff here unless the defendants or either of them requested, solicited or induced Rooney to enter their store for the purpose of selling or giving to him heroin."

The court refused to charge as requested after saying: "I charge that there is no evidence of active inducement of the son of the plaintiff to enter the store of the defendant and acquire the drug habit."

The questions raised by exceptions as we have shown are few. In considering them they must be read with all that was said by the court in connection therewith and with the facts necessarily found by the jury. As so read no question of controlling importance is presented.

The right of a parent to recover for loss of services of a child has long been recognized at common law. (*Maxson v. D., L. & W. R. R. Co.*, 112 N. Y. 559; *Lawyer v. Fritcher*, 130 N. Y. 239; *King v. Viscoloid Co.*, 219 Mass. 420; *Cowden v. Wright*, 24 Wend. 429.)

Such an action is sustained when the loss of services has been caused by an assault and battery (*Cowden v. Wright, supra*); indecent assault (*Whitney v. Hitchcock*, 4 Den. 461); negligence (*Maxson v. D., L. & W. R. R. Co., supra*; *Cuming v. Brooklyn City R. R. Co.*, 109 N. Y. 95); abduction (*Lawyer v. Fritcher, supra*), or other tort by which the parent's right to the services of the child is taken away in whole or in part. When the child's father is dead the mother can maintain the action. (*Gray v. Durland*, 51 N. Y. 424.)

It is an established general rule of law that where a parent sues for loss of services arising from an injury received by his infant child, damages will not be permitted if the evidence shows that the child's negligence was the efficient cause of the injury. (*Kennard v. Burton*, 25 Me. 39; *Honegsberger v. Second Ave. R. R. Co.*, 2 Abb. Ct. App. Dec. 378; *Dennis v. Clark*, 56 Mass. 347, 354; *Kerr v. Forgue*, 54 Ill. 482; *Moore v. Pennsylvania R. R. Co.*, 99 Penn. St. 301; *Chicago, B. & Q. R. Co. v. Honey*, 63 Fed. Rep. 39; *Ainley v. Manhattan Ry. Co.*, 47 Hun, 206.)

It is an equally well-established rule of law that if the conduct of the defendant in such a case was so deliberate, persistent and intentional as to be equivalent in law to positive and willful injury the contributory negligence of the child is not a defense. (*Chapman v. New Haven R. R. Co.*, 19 N. Y. 341.) Unless the evidence is without

conflict it is always for the jury to determine whether the facts in a given case bring it within one rule or the other.

The question distinctly arises in this case whether the plaintiff is entitled to recover punitive or vindictive damages against the defendants. The court charged the jury that if they found the defendants "With evil heart desiring to ruin this boy or not caring at all whether they ruined him or not, knowing that surely he was acquiring this habit, that his life would be more or less affected thereby and that he would eventually become a useless citizen," and permitted "the sale of this poison to make money out of the miseries of this boy and did it from a reckless disregard of any duty towards any human being and out of desire to injure, in such case and no other can you consider the question of so-called punitive or vindictive damages."

The defendants excepted to the charge and the court directed the jury that in case they found a verdict for the plaintiff they should find separately as to the compensatory damages and as to the punitive damages. At the close of the charge the defendants asked the court to charge "That there is no evidence in this case upon which they may predicate or make an award of punitive damages." The court declined to make this charge and the defendants took an exception.

The common-law action which a master or parent has for loss of the services of a servant or minor child is based upon an injury to a property right. Compensation is allowed for loss of services to which the master or parent is entitled and for the expenses incurred by reason of such injury. Much has been written by the courts and by text writers upon the question whether punitive, vindictive, exemplary, aggravated, or retributory damages should be allowed in any case without reaching a generally accepted conclusion. In some states of this country

such damages are allowed by statute, and in others they are by statute prohibited. In most of the states, including this state, such damages are allowed to the person directly injured in cases of wrong committed with malice or reckless disregard of the rights of others. Such damages are allowed in this state in an action by a parent against a person who seduces his daughter. It was said in *Cowden v. Wright (supra)*: "It is true, that in the action for the seduction of a daughter, the jury in fixing upon the damages may regard the wounded feelings of the family; but that case has always been considered *sui generis*, and inconsistent with the fundamental principle of the action." (p. 430.)

We are of the opinion that such damages do not in this case come within the reason on which the common-law action in favor of a third person is sustained. The weight of reason and authority is in favor of confining the damages to be recovered in an action by a third party to compensation for the pecuniary injury actually sustained. (*Cowden v. Wright, supra*; *Whitney v. Hitchcock, supra*; *Cuming v. Brooklyn City R. R. Co., supra*; *Barnes v. Keene*, 132 N. Y. 13. See, also, *Covert v. Gray*, 34 Howard Pr. 450, and *Ruling Case Law*, vol. 20, pp. 614, 615, secs. 24, 25, and cases cited.)

The jury found a verdict in favor of the plaintiff and fixed the compensatory damages at \$2,000 and the punitive damages at \$1,000. Judgment was entered for \$3,000 and costs.

The judgment should be modified by reducing the amount of the recovery to \$2,000, being the amount found for compensatory damages, and, as thus modified, affirmed, without costs to either party in this court or in the Appellate Division.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, HOGAN and McLAUGHLIN, JJ., concur; CRANE, J., absent.

Judgment accordingly.

CHACE TRUCKING COMPANY, Appellant, v. RICHMOND
LIGHT AND RAILROAD COMPANY, Respondent.

Street railways — negligence — horses attached to truck, transporting pile driver through street, killed by electricity passing from trolley wires through truck — whether railroad company was negligent in failing to raise wires to prevent accident question for the jury — contributory negligence of persons driving truck question for the jury.

1. The moving of a pile driver sixteen feet high, loaded upon a truck and drawn by fourteen horses through a street occupied by the tracks and trolley wires of a street railroad, is not necessarily an unreasonable use of the street.

2. Where the railroad company, having been notified by the truckmen moving the pile driver that they intended to take it through the street, sent a wrecking wagon and a gang of men to lift the wires and prevent injury to its wires or to the men and horses engaged in moving the pile driver, the railroad was not a mere volunteer, but was performing its legal duty.

3. In an action brought by the owner of the truck and horses against the railroad company for the value of horses killed by electricity passing through the truck, it appears that plaintiff's employees in charge of the truck hesitated for fear of collision with the trolley wires. The foreman of the defendant urged plaintiff's employees to go on and assured them that the wires would be raised if necessary, saying: "We are here and we will protect you, what more do you want." Relying upon such assurances, plaintiff's employees proceeded, and the truck came into contact with the trolley wire whereby electricity from it passed through the truck and killed some of the horses attached thereto. *Held*, that the order of the Appellate Division reversing the judgment for plaintiff and dismissing the complaint is erroneous; that it was a question for the jury whether the defendant's servants were not negligent in stating that they could and would lift the wire if the danger became imminent and in inviting plaintiff's servants to drive on, when, as defendant's servants now say, that was an impossible thing for them to do. The question of plaintiff's contributory negligence was, also, for the jury.

Chace Trucking Co. v. Richmond Light & R. R. Co., 173 App. Div. 663, reversed.

(Argued December 9, 1918; decided January 28, 1919.)

APPEAL from a judgment, entered July 14, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Henry Waldman and *Joseph G. Abramson* for appellant. The testimony adduced in behalf of plaintiff made out a *prima facie* case, and the questions of the negligence of defendant and the freedom from contributory negligence of plaintiff were properly submitted to the jury. (*American R. T. Co. v. Hess*, 125 N. Y. 641; *Hinman v. Clarke*, 121 App. Div. 105; *Western N. Y. & P. Traction Co. v. Stillman*, 68 Misc. Rep. 546; 143 App. Div. 717.) Appellant was not guilty of contributory negligence. (*Murray v. Dwight*, 15 App. Div. 241; *Brown v. Stevens*, 136 Mich. 311; *Berkhart v. Schott*, 101 Mo. App. 465; *Kettle v. Turl*, 162 N. Y. 255; *Cohen v. Met. St. Ry. Co.*, 63 App. Div. 165; 170 N. Y. 588.)

Bertram G. Eadie and *Frank H. Innes* for respondent. The appellant failed to prove the breach of any duty owed to it by the respondent either in contract, or in tort. (*Dickeson v. Kewanee*, 53 Ill. App. 379; *W. N. Y. & P. Traction Co. v. Stillman*, 143 App. Div. 717; *B. E. L. & P. Co. v. Lefevre*, 49 L. R. A. 771; *Gross v. S. C. C. Ry. Co.*, 73 Ill. App. 217; *Fort Madison St. Ry. Co. v. Hughes*, 14 L. R. A. [N. S.] 448; *Curtis on Electricity* [1915 ed.], §§ 366-376; *Northwestern T. Exch. Co. v. Anderson*, 12 N. D. 585; *N. Y. & N. J. Tel. Co. v. Diezheimer*, 11 N. J. L. J. 246; *Elliott on Roads & Streets*, § 1072; *Piehl v. Albany Ry. Co.*, 19 App. Div. 471.) The appellant was guilty of contributory negligence. (*Shearman & Redfield on Neg.* § 376.)

ANDREWS, J. Bay street, Stapleton, is a street thirty-five to forty-five feet wide running north and south and is paved with asphalt. Through it the defendant has a double-track electric road. Power is conveyed to the cars through two overhead trolley wires, which although loaded with a dangerous current are necessarily exposed, which are fifteen feet from the pavement and each of which is twenty or twenty-two feet from the nearest curb.

On February 23, 1909, the plaintiff was moving by truck a heavy pile driver the top of which reached sixteen feet or more from the pavement. Drawing this truck were fourteen horses. Two of them were hitched side by side to the pole, while the twelve others, two by two, were attached to the pole by a cable. Tied to the rear of the truck was another team hitched to a wagon the wheels of which were locked. Obviously the truck was steered by the action of the two horses hitched to the pole. The twelve in addition would have little effect upon it, unless the cable was taut and they were pulling upon it.

The truck reached Bay street from the east. It was to turn toward the south. It was, therefore, necessary for it to reach the west side of the street, and to do so it had to pass beneath the trolley wires.

The defendant, with its wires and other structures, was rightfully in the street. But it was not there to the exclusion of those other public uses to which the street is adapted. The grant to it was under the implied condition that it would not unreasonably interfere with such uses. (*Lambert v. Westchester Elec. R. R. Co.*, 191 N. Y. 248; *Opdycke v. P. S. R. Co.*, 78 N. J. L. 576; *McKim v. Philadelphia*, 217 Penn. St. 243.) It might be required temporarily to remove its tracks if the street was to be graded (*Matter of Deering*, 93 N. Y. 361); or if a sewer were to be built (*Brooklyn Elec. R. R. Co. v. City of Brooklyn*, 2 App. Div. 98; *New Orleans Gas L. Co.*

v. *Drainage Comn.*, 197 U. S. 453); or other public purposes served (*Chicago, B. & Q. Ry. Co. v. Drainage Comrs.*, 200 U. S. 561; *R. R. v. Middlesex Wakefield*, 103 Mass. 261). Nor might it interfere with the reasonable use of the highway by travelers upon it, even if such use involved temporary obstruction of its traffic or interference with its wires. Under some conditions such a use might include the removal of a building. (*Western N. Y. & P. Traction Co. v. Stillman*, 143 App. Div. 717.) Under others it might not. (*Williams v. Citizens' Ry. Co.*, 130 Ind. 71.) But in any event such use must be reasonable and the traveler might not unduly interrupt the operations of the road or negligently injure its structures. Reasonable use with concurrent rights is the rule.

We cannot say that the removal of this pile driver was an unreasonable use of Bay street. When they reached that street, therefore, what was the duty of the plaintiff's servants? They might not heedlessly destroy the defendant's wires. If without danger they might raise them and so pass beneath they might do so. But these wires were exposed and to the unskilled dangerous. If contact were made injury might happen, not only to plaintiff's servants but to defendant's property. If so, doubtless it would be claimed that the plaintiff was negligent. Yet it had the right to pass. Under these circumstances the defendant was notified of the situation. Equally recognizing the respective rights of the parties, the defendant at once sent a wrecking wagon and a gang of men so that the plaintiff might do in safety what it had a right to do. In this the defendant was not a mere volunteer. It was performing what in our judgment was its legal duty. This gang lifted the wires, signalled when they were ready and the truck was thus enabled to cross to the west side of Bay street and turn to the south. The wrecking wagon followed it closely to protect the defendant's wires should the need again arise.

If the pile driver came in contact with the exposed wires, every one recognized that there was danger, but just so long as the truck was on the level or was going up hill the cable attached to the horses would be taut and there would be no difficulty in steering it safely along the street near the curb.

This was at first the situation. There was a slight ascent, but when the top of the hill was reached a more difficult problem was presented. Ahead was a descent. The road was not straight but on a curve. A tree stood at the side with branches reaching over the street. The pavement was smooth. It had been raining and it was, therefore, probably wet and, to some extent, slippery. The load was of great weight. It could only be held back and steered by the action of the horses attached to the pole. For this purpose the other twelve horses were practically useless. The truck had no brake. The wagon behind would act as a brake to some extent, and would serve to steady the truck in its descent; just how much it is difficult to say without experiment. Any one who has attempted to drive a heavy wagon down a hill with a pair of horses holding back against a load knows how the wagon inevitably moves from side to side. To keep a straight course is most difficult. With reason, therefore, the servants of the plaintiff hesitated.

However, they were rightfully in the street. This the defendant had recognized. With its wagon the defendant's servants were on the spot to prevent a collision. Once already they had done so. Just how efficient they would or could be we may assume the driver of the truck and his companions did not know. But in any event, again the defendant was not a mere volunteer. It was so managing its property as to reconcile its rights with those of the plaintiff.

Knowing whether or not the situation was safe, seeing the plaintiff's hesitation the defendant urged it on. The

plaintiff's foreman, to some extent, at least, had explained his difficulty to the defendant's foreman. He said that the truck would be likely to turn into the wires; that one end or the other would strike them. In reply the defendant's foreman assured him that he and his companions were there and that they would raise the wires if it was necessary. He said "we are here and we will protect you, what more do you want."

It is familiar knowledge that an inference or invitation of assurance may be drawn from the raised gate at a railway crossing — an inference drawn equally whether the gate is required to be maintained or is maintained voluntarily. In principle the express assurance here given is not unlike that there drawn from circumstances. Relying upon it as they had relied on the earlier assurance when they drove under the wires the plaintiff's servants started down the hill. The result, which was reasonably to be expected, happened. The front end of the truck ran toward the middle of the street and came into collision with the trolley wire which was not lifted by the defendant's servants as they had promised. Electricity passed through the truck, and some of the horses attached to it were killed. Under these circumstances we think there is a fair question of fact for the jury as to whether the defendant's servants were not negligent in stating that they could and would lift the wire if danger became imminent, and in inviting the plaintiff to drive on, when as they now say that was an impossible thing for them to do. Whether there was danger or not was a matter in respect to which they assumed to have superior knowledge. Further in giving the assurance that they did, it follows that at least the jury might find that they were acting within the scope of their authority. They were engaged in their master's business. They were acting not for themselves but for it and here as when the wires were first raised, it might well have

been their duty to notify the plaintiff's servants when they might proceed in safety. We think also that the question of the plaintiff's contributory negligence was, under these circumstances, for the jury.

The judgment of the Appellate Division should be reversed, but as that court has disapproved the finding of the jury a new trial should be ordered, with costs to abide the event.

CHASE, J. (dissenting). After the plaintiff's truck with its load reached the west side of Bay street there was nothing to prevent its being safely taken along that street under the defendant's cross wires, if it was kept at or near the curb line. There was a greater clearance under the cross wires at the side than in the center of the street. After reaching the west side of the street the truck was driven southerly three or four hundred feet before it was at the height of ground. It was then stopped.

In considering the relative rights and obligations of the parties the conversation between the two foremen before the truck was again started is helpful. As given by the plaintiff's foreman it was as follows:

"Q. And then you had a talk with the foreman?

A. Then I had a talk with the foreman. I went outside and stood there while we were hooking up the horses. I merely asked him what did he think about it. 'Oh,' he said, 'he measured it — everything would be all right, if we would keep to the right.'

"Q. And what did you say to that? A. I explained to him. I said, 'Now this is going to turn around either one end or the other and strike that wire just as sure as you live when you are going down that hill.' He said, 'No, it aint. We are here. We will raise the wire up for you.' * * *

"Q. Mr. Haslegreen, after the foreman told you that

he was there and that he would raise the wires, did you say anything to him? A. Why, I said to him: 'Well, wait a moment; I have to think over that. In regards to what?'

"Q. Well, give me this conversation that you had with him, before you proceeded to go along with your truck. Was anything said at that particular time? A. Nothing, only as everything is all right; go ahead.

"Q. Who said that? A. The foreman of the wrecking crew.

"Q. And then what did you do? A. Well, I had all my drivers standing there along side of me.

"Q. Yes, and what did you do? A. We used a little judgment before we started, and we asked one another, would we think it right for to start. So the wrecking crew people told us to go ahead, 'We are here, and we will protect you. What more do you want?'"

The second truck was then attached to the truck carrying the pile driver and its wheels were chained so as to make it a drag on the loaded truck and prevent it from descending the slight grade by gravity. Plaintiff's foreman directed his drivers to start the horses and they proceeded with the load. After going a short distance the pile driver came into contact with the live wire and some of the horses were injured. A short time thereafter the horses that were not injured were attached to the truck and it with the pile driver was taken to the place of destination without assistance or further accident. In doing so it was kept along the curb and passed under the cross wires. The front wheels of the truck were four and the rear wheels six feet apart. When the accident occurred and the propelling power was removed from the truck it stopped immediately and its left front wheel was on or very near the defendant's track and its left rear wheel on or about three feet from the track. The turn to the left and the distance traveled had been

sufficient so that the truck instead of being along the curb as it was when the conversation mentioned took place was at or upon the defendant's track. The front part of the truck was at least sixteen feet from the curb. The horses were all in the center of the street along the defendant's car tracks.

There is no claim that either of the parties hereto were unlawfully occupying the public street. Upon the facts disclosed neither had the right to use the street to the exclusion or injury of the other. The use of it by each was subject to reasonable use by the other. It is not necessary or desirable to discuss the rights of the parties in case either had attempted to assert and enforce its alleged rights as against the asserted and alleged rights of the other. Their apparent relation to each other on the day of the accident was one of mutual helpfulness. The purpose of the wrecking crew in accompanying the plaintiff's employees so far as appears was to protect the defendant's property from injury. So far as they were assisting the plaintiff their service was voluntary and gratuitous. There was no express contract between them. There was no implied contract except that reasonable care would be exercised in whatever was actually done or undertaken by either. The defendant's employees had lifted the wires to permit the plaintiff to pass under them when it first came upon Bay street without asserting any claim to be paid therefor and remained to perform gratuitously any service that became necessary for the care of the defendant's property and the convenience of the plaintiff. That there was no necessity for lifting the wires generally along the street is shown by the fact that the plaintiff continued along the curb line without meeting any obstruction for three or four hundred feet on Bay street to the height of ground near where the accident happened. The conversation that we have quoted consisted principally of expressions

of opinion. That the plaintiff's foreman did not wholly rely on the opinion of the defendant's foreman is apparent from the conversation as given by him. He consulted with his drivers and concluded to proceed. The statement of the defendant's foreman amounted to an expression of opinion that the plaintiff could proceed safely if he would keep to the right, and it was accompanied by a statement in substance that he would raise the wires if it at any time became necessary.

The representative of each party was fully aware of the danger of coming into contact with a live wire. It cannot be assumed from the record that the members of the wrecking crew had a superior knowledge in regard to handling the truck with its heavy load to that of the plaintiff's foreman and his associates who had been engaged for years in the trucking business.

It required from ten to fifteen minutes to raise the wires in one place. It could not be done from time to time as the truck was moving. The necessity, if any, for raising the wires had, therefore, to be determined in time to stop the truck and wait until the wires were raised before proceeding further. When the truck started it did not move rapidly. It seems to have been under full control. As it proceeded danger of contact with the live wire must have been apparent, but there does not appear to have been any effort to stop it before the accident to the horses which cut off the propelling power. It is quite evident from the testimony that if the movement of the truck had been closely watched and the plaintiff's drivers had proceeded very slowly around the curve and past the tree, the truck could have been stopped on signal from the foreman the instant danger was imminent. In that case the defendant's workmen were there to lift the wire at the place of immediate danger and permit the truck to continue as it did after the accident along the curb to the place of destination.

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I am of the opinion that there is no justification for the assumption by a majority of the court expressed in words as follows: "We think that there is a fair question of fact for the jury as to whether the defendant's servants were not negligent in stating that they could and would lift the wire if danger became imminent and in inviting the plaintiff to drive on when as they now say that was an impossible thing for them to do. Whether there was danger or not was a matter of which they had knowledge and of which the plaintiff's servants had no knowledge."

The judgment of the Appellate Division should be affirmed, with costs.

HISCOCK, Ch. J., CARDOZO and POUND, JJ., concur with ANDREWS, J.; COLLIN and CUDDEBACK, JJ., concur with CHASE, J.

Judgment reversed, etc.

FRANK GILHOOLEY, Appellant, v. HENRY P. BURGARD,
Respondent.

Master and servant — negligence — action under Employers' Liability Act — erroneous reversal by Appellate Division of judgment for plaintiff on ground that defendant was not guilty of negligence as matter of law — effect of reversal of decision of Appellate Division by Court of Appeals.

1. Upon examination of the evidence in an action for negligence brought by a servant against the master under the Employers' Liability Act, *held*, that a question of fact was presented for determination by a jury as to the actionable negligence of the defendant in the method adopted for doing the work in question; as to whether or not the plant was defective, in that there existed on the part of defendant a failure to supply proper apparatus and adopt such measures as would reasonably guard against an obvious danger which might arise from the method adopted, and that the Appellate Division was in error in determining as matter of law that the defendant was not guilty of negligence.

2. The Appellate Division having reversed the judgment of the Trial Term solely upon the ground that plaintiff had failed to estab-

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lish actionable negligence on the part of the defendant, the determination was equivalent to an express reversal on the law and affirmance on the facts. The conclusion of this court that the reversal upon the law was error leaves the facts found by the jury favorable to plaintiff, unaffected by the order of reversal.

Gilhooley v. Burgard, 175 App. Div. 911, reversed.

(Argued January 9, 1919; decided February 4, 1919.)

APPEAL from a judgment, entered October 24, 1916, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint on the ground that the plaintiff failed to show actionable negligence in an action to recover for personal injuries.

The facts, so far as material, are stated in the opinion.

Thomas Woods for appellant. The defendant was guilty of negligence causing plaintiff's injuries. (*Donohue v. East River M. & L. Co.*, 224 N. Y. 149; *Maloney v. Cunard Steamship Co., Ltd.*, 217 N. Y. 278; *Faith v. N. Y. C. & H. R. R. Co.*, 109 App. Div. 222; 185 N. Y. 556; *Connolly v. Hall & Grant Const. Co.*, 192 N. Y. 182; *English v. Milliken Bros., Inc.*, 132 App. Div. 501; *McGlynn v. Pennsylvania Steel Co.*, 144 App. Div. 343; *Tamaseric v. Beckwith*, 145 App. Div. 78; *Baccelli v. New England Brick Co.*, 138 App. Div. 656; *Palin v. Cary Brick Co.*, 133 App. Div. 483; *Finklestein v. Kramer*, 133 App. Div. 565; 197 N. Y. 594; *Pepe v. Utica Pipe Foundry Co.*, 132 App. Div. 458; *O'Brien v. Buffalo Furnace Co.*, 183 N. Y. 317; *Doing v. N. Y., O. & W. Ry. Co.*, 151 N. Y. 579; *Dowd v. N. Y., O. & W. Ry. Co.*, 170 N. Y. 459; *Guilfoyle v. McDermott*, 146 App. Div. 900; 205 N. Y. 557; *Moon v. Coon Const. Co.*, 216 N. Y. 178.) The plaintiff was not guilty of contributory negligence and did not assume the risk. (*Donohue v. E. R. M. & L. Co.*, 224 N. Y. 149; *Maloney*

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v. *Cunard S. S. Co.*, 217 N. Y. 278; *Seyford v. Southern Pacific Co.*, 216 N. Y. 613; *Robinson v. Ocean S. S. Co.*, 162 App. Div. 169; *Boyle v. Degnon-McLean Const. Co.*, 47 App. Div. 311; *Tully v. N. Y. & T. S. S. Co.*, 10 App. Div. 463; 162 N. Y. 614; *Caboni v. Gott*, 149 App. Div. 440; *Thompson v. Levering & Garrigues*, 155 App. Div. 554; *Graves v. Stickley Co.*, 125 App. Div. 132; 195 N. Y. 584.)

H. D. Bailey for respondent. It appears from the evidence in this case that the plaintiff was a man of vast experience in the operation of the dredge, including the work of removing the crane; that his injuries were sustained because he did not take ordinary precautions for his own safety, and that he assumed the risk. (*Duke v. American Museum*, 157 App. Div. 640; *Hammond v. Union Bag & Paper Company*, 151 App. Div. 776; 3 LaBatt on Master & Servant, § 925; *Earl v. Clyde S. S. Co.*, 103 App. Div. 21; *Watts v. Beard*, 18 App. Div. 243; *Bagley v. Consolidated Gas Co.*, 5 App. Div. 432; 160 N. Y. 695; *Ludlow v. Groton Bridge Company*, 11 App. Div. 452; *Ozogar v. Pierce*, 134 App. Div. 800; *Brust v. Perkins Co.*, 113 App. Div. 633.) There was no defect in the condition of the ways, machinery or plant, and no negligence of a superintendent or person intrusted with authority over the plaintiff. (*Gmaehle v. Rosenberg*, 178 N. Y. 147; *Simpson v. Foundation Company*, 132 App. Div. 375; *Vogel v. American Bridge Co.*, 180 N. Y. 373; *Quinlan v. Lackawanna Steel Co.*, 107 App. Div. 176; *Hope v. Scranton*, 120 App. Div. 595.)

HOGAN, J. The defendant was engaged as a contractor on barge canal work in the erection of a dam and locks on the Oswego river at or near Minetto, Oswego county, some few miles south of the point where the river empties into Lake Ontario at the city of Oswego,

N. Y. The plaintiff was employed by defendant as an engineer upon a dredge used on the work. He met with an accident causing injuries for which recovery was had at the Trial Term.

At the point where the accident occurred the river is several hundred feet in width. Coffor dams had been constructed in the river, one running from the westerly shore easterly into the river, a distance of some four hundred feet, to a space of one hundred feet open water, and a second coffer dam some four hundred feet on a line with the first coffer dam referred to running to the shore on the easterly side or bank of the river. The presence of the two coffer dams in the river necessarily increased the current of the stream passing through the one hundred feet opening to seven or eight miles an hour.

The accident occurred December 16th. Just prior to that day the dredge on which the plaintiff was employed and the scows used in connection therewith had been in use on the north side of the coffer dam which projected from the west bank of the river and about midway between the bank of the river and the open space between the coffer dams. On December 15th, one Smith, the superintendent of the defendant, in the presence of the crew of the dredge, said: "We will lay up; we are not going to do this work down here at the lower bridge; you can start to strip her this afternoon. Get your dipper handle out and take the dipper off, and tomorrow pull under the cableway, take the crane off with the cableway and take it across the river to the west side." Thereupon the dipper and dipper arms were removed and placed on the scow on the north side of the coffer dam, and the scows tied up with ropes and a cable from the dredge.

The cableway, so termed, was constructed as follows: On the easterly and westerly banks of the river a tower some fifty feet in height was erected, from the top of the

towers a steel cable about nine hundred feet in length and two to two and one-half inches in diameter was suspended. A carriage is placed on the cable. From the carriage was hung a single or double block dependent upon the weight to be elevated. A wire rope is rove through the sheaves on the carriage and then from the single or double block, the hoisting block back to the engine. The operation of moving the carriage back and forth on the cable is carried on through an endless chain which runs around another drum on the engine which is controlled by an engineer. The engine in the present case was on the easterly side of the river close to the tower.

The crew on the dredge consisted of five men, the plaintiff who was the engineer or operator, one Arroway, the crane tender, Charles Thompson, Sr., fireman, one Metcalf and Charles Thompson, Jr., deckhands. On December 16th, the crew took the dredge from the north side of the coffer dam around under its own power into the open waterway to a point about underneath the cableway, a short distance south of the northeast corner of the coffer dam. At a given signal by Arroway, the crane tender, who was upon the coffer dam, the plaintiff, who was operating the engine on the dredge, stopped, dropped the spuds and used a dredge hoist cable for the purpose of fastening the dredge to the end of the coffer dam to hold the same against the current in the river.

Attached to the dredge was a crane twenty-six feet long, eight feet wide at the bottom and three feet at the top or outer edge, V shaped, weighing about six tons. To dismantle the dredge it was necessary to remove the crane from the same. The crane was held in position in the following manner: A cast iron post called the crane post fits in a ball and socket at the bottom of the post which is under water. At the top of the post was a cap which held the post in position. The cap weighed about two

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hundred pounds and consisted of two castings fastened together with four bolts. To remove the crane it was necessary to pull the crane back so that the cap would be free. Before the crane could be taken off and to prevent binding it was essential that the strain on the bolts through the cap be released. Attached to the carriage on the cableway were two chains described as bridle chains about eight feet in length.

Arroway, the crane tender, proceeded to attach the bridle chains to the crane assisted by Metcalf, one of the deck hands. Three several attempts were made before they finally succeeded in placing the chains so that the crane appeared to be balanced in the clear or cap and the crane post free. With the crane in that position it was then a matter of the removal of the bolts holding the cap in position. The crew proceeded to remove the nuts from the bolts in the cap at the top of the crane with wrenches weighing thirty or forty pounds each. Two men were required to handle each wrench. Plaintiff, the engineer, was assisting in the work of dismantling. After the crane had been held for some minutes, and when the nuts were nearly off, the crane suddenly went outward and upward, then back, quickly, striking the plaintiff and causing the injuries complained of.

The action was brought under the Employers' Liability Act. The plaintiff asserts that defendant was negligent in the method employed under the direction of the superintendent of defendant; that the work of dismantling the dredge, including the removal of the crane therefrom by the use of the cableway, was an unusual and unknown method; that it was a dangerous method to adopt in view of the difficulties of holding a crane of the weight of the one in question in the manner directed in this case, and was a method unknown to any of the witnesses employed upon the dredge, all of whom testified that they had never known of the use of a cableway for

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removing a crane from a dredge as was undertaken in the present case.

Evidence was introduced on behalf of the plaintiff tending to show that the ordinary and customary way of removing a crane from a dredge and which had been adopted in previous years on the dredge in question, was by the use of shear poles, and such method was described in detail. Evidence was also offered on the part of the plaintiff that no ropes or guide cables were furnished, and in addition two experts were called with reference to the method adopted in this case in the dismantlement of the dredge and the usual and customary method adopted in such work. One witness, Mr. Guilfoyle, who had thirty years' experience and was familiar with the location where this work was done, and who as the fact appeared constructed and used in 1887 the first cableway in use and was familiar with the construction and operation of cableways, was examined at considerable length and gave evidence tending to show that the method adopted by defendant in the use of a cableway was not the customary or ordinary method of dismantling dredges, and in his extended experience he had never known or heard of such method being employed. He described the cableway, the manner of the operation of the same and the effect of the absence of guide ropes in the operation of the work in question as undertaken. He testified that the cable except on the tower was not stayed or guyed in any way; that the absence of such stays or guys would cause the cable to flap or swing, flopping up and down vertically and swing horizontally — a sudden take up or drop of the load would cause the cable to flop or sway one way or the other; that in the attempt to elevate a heavy load with a cableway in the nature of the crane in question, there would be a number of factors which he described as insecure and unsafe connected with the operation, namely, the fasten-

ings on the carriage, the wire rope fastenings on the carriage, danger of slipping, and which may also occur by the fastening of the hoist lift on the hoist block slipping, or by the friction on the drums slipping, thus throwing sudden strains on the cable which would make it jump or sway. He testified that the usual and customary method of dismantling a dredge and removal of a crane therefrom was to dismantle with the power of the dredge, the use of tackle blocks, ropes, shear legs or a frame, and to hold it rigid at all times without any chance of having it jump or sway; that there was no practical way of guying the cableway itself in view of the open space in the river at the time the dredge was dismantled. The second expert witness called by plaintiff, a man of long experience in work of the character carried on, gave evidence along the same lines as that given by Mr. Guilfoyle.

On behalf of the defendant issue was taken upon every material fact asserted by plaintiff, and evidence offered tending to show that the crane as it was elevated out of its position on the dredge on the cableway might have been stayed by means of cables or with fall lines from the dredge, so that when the ends were let loose from the bolts the crane would not leave its position. Additional means by which the crane could have been stayed were referred to. Likewise evidence was introduced as to the method of doing the work by means of shears and falls and danger attendant upon such method. Further evidence was presented on behalf of the defendant upon the issue as to whether or not guy ropes, chains or cables for the purpose of carrying on the work of dismantlement were accessible to the men on the dredge.

The trial judge submitted to the jury the question as to whether or not the method used in dismantling the dredge was a dangerous method or such a method as would be adopted by an ordinarily prudent man. He also charged the jury with reference to the duty of a

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master towards his servant, to provide for the servant a reasonably safe place to work, ordinarily safe tools and implements to work with, and reasonably competent fellow-servants, and submitted to the jury the question of the negligence of the defendant, the freedom from negligence of the plaintiff and whether or not the risk was one which the plaintiff assumed.

Without further reference to the evidence adduced on the trial, we conclude that the evidence offered by the parties to this action presented a question of fact for the jury as to the actionable negligence of the defendant in the method adopted for doing the work in question; as to whether or not the plant was defective, in that there existed on the part of defendant a failure to supply proper apparatus and adopt such measures as would reasonably guard against an obvious danger which might arise from the method adopted, and that the Appellate Division was in error in determining as matter of law that the defendant upon the evidence was not guilty of negligence.

The Appellate Division having reversed the judgment of the Trial Term solely upon the ground that plaintiff had failed to establish actionable negligence on the part of the defendant, the determination was equivalent to an express reversal on the law and affirmance on the facts. Our conclusion that the reversal upon the law was error, leaves the facts found by the jury favorable to plaintiff unaffected by the order of reversal.

The order and judgment of the Appellate Division should be reversed and the judgment of the Trial Term reinstated, with costs to appellant in this court and in the Appellate Division.

HISCOCK, Ch. J., CHASE, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Judgment reversed, etc.

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ELENOR L. MORGAN et al., Appellants, v. ELMER E. SANBORN, as Executor of MELISSA V. WALLER, Deceased, Respondent, and EMMA L. WALLER et al., Appellants.

Contract — specific performance — husband and wife — execution of will by each giving all property to the other under an agreement that survivor should by will distribute the property among the next of kin of both — when the wife, who survived her husband, failed to comply with the agreement, the next of kin of her husband can maintain an action for the specific performance of the contract.

1. In actions, except where a new trial is ordered, no appeal as of right may be taken to the Court of Appeals except from a final judgment. Such an appeal may not be taken from the order of the Appellate Division directing such a judgment; but upon an appeal from a judgment the appellant may in his notice state that he appeals from it or from a specified part thereof. (Code Civ. Pro. § 1300.)

2. An agreement is valid and enforceable under which a childless husband and wife execute wills giving all their property to each other, the survivor to execute a will disposing of the entire property constituting both estates by distributing the same among the next of kin of the husband and wife, the distribution to be made in sums according to the judgment of the survivor. (*Seaver v. Ransom*, 224 N. Y. 233, followed.)

3. Where such an agreement was made and the wife, who survived her husband, made a will giving a certain amount to her husband's next of kin and a certain amount to her own next of kin, substantially the total of the combined estates, and reciting the agreement, but thereafter made a second will, giving the entire estate to her own next of kin, revoking her first will, the next of kin of her husband may maintain an action for the specific performance of the contract between the husband and wife, and the Statute of Frauds is not a bar to such action.

4. Where upon the trial of such an action the trial court found as a fact that no such agreement was made by the husband and wife and that the execution of the revoked will was obtained by fraud and duress and that it was null and void and, therefore, dismissed the complaint; and, upon an appeal from the judgment of the trial court, the Appellate Division found as a fact that such agreement was made, but affirmed the judgment upon the sole ground that

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the agreement did not require the wife, as the survivor, to give to the next of kin of her husband any substantial amount and that equity would not interfere to enforce a mere nominal right in their favor, *held*, that the next of kin of the husband, although they cannot object to the probate of the last will of the wife, may enforce the contract in equity. The order and judgment of the Appellate Division should be reversed and a new trial ordered, in which the contract may be enforced. As the wife had the right to revoke her will the property should be distributed in accordance with the provisions of the Decedent Estate Law (Cons. Laws, ch. 13, §§ 29, 98) and of the Real Property Law (Cons. Laws, ch. 50, § 160). At most one-half of the estate may go to the next of kin of the husband.

Morgan v. Sanborn, 173 App. Div. 946, reversed.

(Argued November 26, 1918; decided February 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 8, 1916, affirming a judgment in favor of defendant, respondent, entered upon a dismissal of the complaint by the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frederick W. Clark for plaintiffs, appellants. It having been definitely decided by the Appellate Division that the agreement was made between Josiah Waller and his wife Melissa, the court has power to direct that its terms be carried out by the executor of Melissa, the survivor. (*Edson v. Parsons*, 155 N. Y. 555; *Piper v. Howard*, 107 N. Y. 82; *Rastetter v. Hoenninger*, 214 N. Y. 73; *Gates v. Gates*, 34 App. Div. 608; 54 N. Y. 454.) The agreement having been established and the wife Melissa having acted upon it and made a will in accordance therewith giving to her husband's heirs specific amounts, the terms of the contract are definite and certain, because that is certain which may be made certain, and the extent of the substantial rights given to the appellants had been determined by Melissa herself. (*Phelan v. U.*

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S. Trust Co., 186 N. Y. 184; *Pomeroy on Spec. Perf.* § 31; *Sprague v. Cochran*, 144 N. Y. 104; *Smith v. Smith*, 125 N. Y. 224.)

George H. Taylor, Jr., for defendants, appellants. The agreement in question should be specifically enforced because it is equitable, not unconscionable, and is mutual. (*Hamlin v. Stevens*, 177 N. Y. 39; *Winne v. Winne*, 166 N. Y. 263; *Healy v. Healy*, 166 N. Y. 624; *Hall v. Gilman*, 77 App. Div. 458.) The agreement in question when read in connection with the will of Melissa V. Waller, containing a recital thereof and made in pursuance of such agreement, is complete and definite and, therefore, specific performance of same should have been ordered. (*Cooth v. Jackson*, 6 Ves. 12; *Brown v. Bellows*, 4 Pick. 189; *Pomeroy on Spec. Perf.* 1897, § 149; *Atwood v. Cobb*, 16 Pick. 230; *Darby v. Whitaker*, 4 Dem. 134; *Pritchard v. Ovey*, 1 J. & W. 396; *Kensington v. Phillips*, 5 Dow. P. C. 61.)

Edward S. Clinch for respondent. The judicial discretion upon which the right to the specific performance of a contract rests should not be exercised in support of the alleged agreement. (*Winne v. Winne*, 166 N. Y. 263.)

ANDREWS, J. Josiah and Melissa Waller were husband and wife and childless, their nearest relatives being brothers and sisters and their children. On September 19th, 1910, they each executed a will, giving all of their property to the other. The appellants claim that this was done under an agreement that the survivor should execute a will disposing of the entire property constituting both estates by distributing the same among the next of kin of the husband and wife, the distribution to be made in sums according to the judgment of the survivor.

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Mr. Waller died on February 12th, 1911, and his estate — \$88,000 as the appellants claim — \$44,000 as the respondent concedes — went to the wife. On February 27th, 1911, Mrs. Waller executed a will giving \$55,000 to various of her husband's kin and \$50,000 to various of her own kin, and reciting the agreement. This was substantially the total of the combined estates. On April 19th, 1911, she made a second will, giving the entire estate to her own kin and revoking the first will. She died on January 1st, 1914.

The complaint in this action, which is brought by certain of Mr. Waller's next of kin, asks for the specific performance of the contract between Mr. and Mrs. Waller and the distribution of her estate as provided in the revoked will. Such an action may be maintained (*Seaver v. Ransom*, 224 N. Y. 233; *Edson v. Parsons*, 155 N. Y. 555, 571), and the Statute of Frauds is not a bar.

The trial court found, among other things, that no such agreement, as claimed by the appellants, was made by Mr. and Mrs. Waller, and that Mrs. Waller's signature to the revoked will was obtained by fraud, duress and intimidation, and was not her free and unrestrained act. It, therefore, found as a conclusion of law that this revoked will was null and void, and that the complaint should be dismissed upon the merits with costs. From the judgment entered on these findings an appeal was taken to the Appellate Division. The result was an order and judgment of affirmance which reversed the findings that no agreement was made between Mr. and Mrs. Waller, and that the signature to the revoked will was obtained by fraud and intimidation; reversed the conclusion of law that the revoked will was void; found as a fact that the agreement alleged by the appellants was made between Mr. and Mrs. Waller, but held that such agreement conferred no substantial right upon the next of kin of

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Mr. Waller, and ordered that the judgment be affirmed upon the sole ground that this agreement did not require the wife as the survivor to give to the next of kin of the husband any substantial amount, and that equity would not interfere to enforce a mere nominal right in their favor.

Thereupon an appeal was taken to this court from a part of the order of affirmance and from so much of the judgment of affirmance as held that the plaintiffs had no substantial rights under the agreement and as affirmed the judgment appealed from upon the ground stated, "It being the intention of the above named plaintiffs to bring up for review in the Court of Appeals so much of the said actual determination of the Appellate Division, second department herein, as adjudges that the agreement" referred to "conferred upon the next of kin of Josiah A. Waller no substantial right; and also to bring up for review in the Court of Appeals so much of the said actual determination of the said Appellate Division as affirmed the judgment of July 1st, 1915, herein, without costs, upon the sole ground that the said agreement between Josiah A. Waller and Melissa V. Waller, husband and wife * * * did not require her as the survivor to give to the next of kin of the husband any substantial amount, and that equity will not interfere to enforce such a nominal right on the part of the next of kin."

In actions, except where a new trial is ordered, no appeal as of right may be taken to this court except from a final judgment. Such an appeal may not be taken from the order of the Appellate Division directing such a judgment. (Cardozo on the Jurisdiction of the Court of Appeals, sec. 85; *Derleth v. DeGraff*, 104 N. Y. 661.) This being so, so much of the appellants' notice of appeal as refers to the order of the Appellate Division is irregular. Upon an appeal from a judgment the appellant may in his

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notice state that he appeals from it or from a specified part thereof. (Code Civ. Pro. sec. 1300.)

What the appellants have sought by adopting the form they use is clear. The finding of fact against them in the trial court is reversed. Instead one is made in their favor. Therefore, if the Appellate Division is wrong in its legal conclusion, they wish this court to direct judgment for them. On the other hand, the respondent claims that only the grounds for affirmance — not the affirmance itself — is questioned. Therefore, whether these grounds were right or wrong, the original judgment stands and we may not review it. This construction of the effect of the notice of appeal is too narrow. Taken as a whole it informs the court that it is from the judgment of affirmance and is based upon the ground that this judgment is not supported by the findings as made. If this is true it must be reversed. And upon the reversal we may either award a new trial or grant to either party such judgment as he may be entitled to. (Code Civ. Pro. § 1337.)

After finding the agreement under which the mutual wills were made, the Appellate Division has interpreted it as meaning that it would be satisfied in case the survivor gave to the next of kin of the husband, or to one of them, some sum, however small, and that, therefore, there was conferred upon them no substantial right. Consequently, equity would not interfere to enforce on their behalf a mere nominal claim.

There are three possible constructions which might be given to this agreement: (1) That adopted by the Appellate Division. It involves the idea that under the agreement two classes of beneficiaries are created — the husband's next of kin and the wife's. (2) That, there being two classes, each class was entitled to one-half of the joint estate, the survivor to distribute such half among the members of each class according to his or her

judgment. (3) That but one class was created, all of the next of kin of either husband or wife, to any one of whom the whole joint estate might be given.

If the last is the true construction, the complaint should be dismissed. The distribution "in sums according to the judgment of the survivor," does not fairly imply that each of the next of kin must receive something even if an unsubstantial amount. Clearly such was not the intent of the parties to this agreement. That such is not thought to be the intent, under somewhat similar circumstances, is shown by the adoption by the legislature of section 158 of the Real Property Law. (Cons. Laws, chap. 50.) "Where a disposition under a power is directed to be made to, among, or between, two or more persons, * * * when the terms of the power import that the estate or fund is to be distributed among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others." What was sought was the intent of the grantor of the power, and this rule was finally reached as the true expression of that intent.

Again the complaint must be dismissed if the Appellate Division is right as to the meaning of this agreement. If the most that the appellants can claim is merely nominal recognition, then a court of equity will not interfere. It is only in case we adopt the second construction, as we have defined it above, that there should be a reversal.

Yet this, we think, was what was in the mind of the parties. They were elderly, childless, each with near relatives. Each had considerable property. Naturally each would wish to benefit his or her own family. The husband was on friendly terms with at least one brother, for he made him his executor. Five months later, after her husband's death, Mrs. Waller did actually make

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substantially such a division. Finally, just as where the meaning of a will is doubtful, a construction should be given which prefers the blood of the testator to strangers (*Wood v. Mitcham*, 92 N. Y. 375), so should it be here with regard to a contract regulating the disposition of the estates of Mr. and Mrs. Waller.

Giving the contract this construction, however, we cannot agree with the contention of the appellants that the will of February 27th, 1911, controls the rights of the parties. The two wills of September 19th did not, themselves, contain the provisions for final distribution upon which the testators had agreed. In themselves they did not fix the rights of the ultimate beneficiaries. The division was to be made by will at a later time according to the judgment of the survivor. It was to take place at the death of him or her and he or she could exercise their judgment at any moment up to that hour. Any prior action was merely tentative.

The February will was of that character. It did substantially comply with the agreement. It did show what was Mrs. Waller's judgment at that time. But it could be altered or revoked. When revoked it ceased to be Mrs. Waller's will. It could not be offered for probate. Only the later will could be so offered. "It is no objection to the probate of a will that a testator had made a valid contract to dispose of his property in a different manner than that provided in the will, or that the will offered for probate revokes a will drawn in accordance with the terms of the contract." (*Sumner v. Crane*, 155 Mass. 483.) A like ruling has been made in Alabama (*Allen v. Bromberg*, 147 Ala. 317), and in Surrogate's Court in this state. (*Matter of Keep's Will*, 2 N. Y. Supp. 750; *Matter of Gloucester's Estate*, 11 N. Y. Supp. 899.) And in *Edson v. Parsons* (155 N. Y. 555, 564) we stated that the claim in such a case was not that the testator had incapacitated herself from making

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another will, but that her estate was bound by an antecedent obligation.

While, however, those for whose benefit the contract was made may not object to the probate of Mrs. Waller's last will, they may enforce the contract in equity. If it is contained in mutual or joint wills later revoked by the survivor, those wills may be carried out, not as wills but as contracts. (*Rastetter v. Hoenninger*, 214 N. Y. 66.) But this contract, as we construe it, was that the survivor should by will distribute the total estates in a certain manner. This Mrs. Waller failed to do. She did not do it by her earlier will. That is revoked. She had a right to revoke it. Simply because it showed her intention at the time it was executed is no more important than if it had been executed without witnesses, or had not been properly signed, or if instead of a will there had been an oral declaration of intention.

With an enforceable contract, therefore, for the distribution of this estate between two classes of beneficiaries, but with the discretion as to how each share should be divided unexercised, the court is not helpless. It may not exercise the discretion for Mrs. Waller. But the result is equality. Again the analogy of the Real Property Law as to powers is pertinent. "If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all persons designated as beneficiaries of the trust." (Sec. 160.) Not literal equality among each member of the class. That class is described by the words "next of kin." In view of the policy of our state, as shown by sections 29 and 98 of the Decedent Estate Law, where a division is to be made under such circumstances, they take *per stirpes*. This is a somewhat different theory than that advanced in the complaint. There the will of February 27th is recited and the legacies given to each of the appellants by that

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will. It asks that these legacies be paid. In the prayer for relief it is demanded that the defendant executor be enjoined from paying out any of the estate; that he be adjudged to hold the whole of it in trust for the purpose of carrying out a contract between the husband and wife and performing the bequests provided for in the will of February 27th; that the court decree that Mrs. Waller had no power to revoke or change that will, and that an accounting be had in order that the amount of the residuary estate be determined. The answer of the other appellants reiterates and realleges each of the allegations contained in the complaint and expressly joins in its prayer for relief. But while entitled to relief, the plaintiffs and the defendants who are interested with them are not entitled to this relief. At most one-half of the net estate may go to them. It is their right only that we discuss here. The interests of Mrs. Waller's next of kin among themselves are not before us.

In view of our conclusion as to the effect of Mrs. Waller's earlier will, the rulings of the trial court upon questions of evidence need not be considered. That will may be material as an admission of the fact of the contract. It may be admissible upon the question of the practical construction given to this contract by the survivor. But if the testimony which it is now said should have been rejected or received is again offered, the trial court will be in a position to rule upon it in view of the purpose for which this will may only be received in evidence.

The judgment of the Appellate Division should be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., CHASE, HOGAN and McLAUGHLIN, JJ., concur; CARDOZO and POUND, JJ., dissent.

Judgment reversed, etc.

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CARL D. RITZWOLLER, Appellant, v. GUSTAV LURIE et al.,
Respondents.

Stock corporations — stock subscriptions — action for rescission of subscription to stock and for rescission of contract of employment — when action for rescission of subscription to stock may be maintained on ground of fraud — action for rescission of contract cannot be maintained when plaintiff has other and adequate remedy.

1. This action was brought by the plaintiff seeking rescission of a subscription made by him for capital stock of the defendant corporation and to have repaid to him the sum paid on such subscription; also to have rescinded a contract of employment made by him with the corporation with an accounting for damages claimed to have been sustained by him under the contract. This relief is sought upon the ground that the plaintiff was induced to make the subscription and contract by the fraudulent representations of the individual defendant acting in behalf of the corporation. *Held*, on examination of the complaint on demurrer, that while the representations of the individual defendant through which plaintiff was induced to subscribe for stock and enter into the contract of employment related to something which was to occur in the future in the way of organization of the corporation and payment for its stock in full with property and cash, the allegations describe a case where a defendant has fraudulently and positively as with personal knowledge stated that something was to be done when he knew it was not to be done and that his representations were false. Such statements and representations when false are actionable. (*Adams v. Gillig*, 199 N. Y. 314, followed.)

2. Upon the allegations of the complaint as to the contract for employment and demand for its rescission, even if they are sufficient to state a cause of action, it is doubtful whether plaintiff is entitled to equitable relief, nor does he need such relief to protect whatever rights he has.

3. A demurrer is well interposed by the individual defendant. In making the alleged false representations he acted on behalf of the corporation and the money paid by plaintiff to him was so paid for the purpose of being turned over to the corporation for stock and was in fact so turned over. No cause of action is alleged against him personally.

Ritzwoller v. Lurie, 180 App. Div. 934, modified.

(Argued January 7, 1919; decided February 7, 1919.)

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Points of counsel.

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APPEAL from a judgment, entered June 17, 1918, upon an order of the Appellate Division of the Supreme Court in the second judicial department, which reversed an order of Special Term overruling demurrers to the complaint, sustained such demurrers and directed a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Charles A. Winter and *Adolph Boskowitz* for appellant. 'The amended complaint contains all of the essentials of a good cause of action for rescission. (*Vail v. Reynolds*, 118 N. Y. 297; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Bosley v. N. M. Co.*, 123 N. Y. 550; *Leary v. Geller*, 224 N. Y. 56; *East River Nat. Bank v. Columbia Trust Co.*, N. Y. L. J. June 28, 1918; *Mack v. Latta*, 178 N. Y. 525; *Hooker, Corser & Mitchell Co. v. Hooker*, 103 Misc. Rep. 66; *Kountze v. Kennedy*, 147 N. Y. 124; *Gabriel v. Graham*, 168 App. Div. 847; *Burrows v. Smith*, 10 N. Y. 550; *McDermott v. Harrison*, 30 N. Y. S. R. 324.)

Louis Maxwell Cohen and *M. Montefiore Henschel* for respondents. The complaint does not state facts sufficient to constitute a cause of action or causes of action. (*Wilson v. Meyer*, 154 App. Div. 302; *Remmer v. Berbling*, 66 Misc. Rep. 291; *Johns v. Clothier*, 139 Pac. Rep. 755; *Van Slochem v. Villard*, 207 N. Y. 587; 154 App. Div. 161; *Armstrong v. Danahy*, 75 Hun, 405; *Yonkers, etc., Co. v. Jones*, 30 App. Div. 316; *Leszynsky v. Ross*, 35 Misc. Rep. 652; *Booth v. Dodge*, 60 App. Div. 23; *Garret Co. v. Appleton*, 101 App. Div. 507; *B. & N. Y. C. R. R. Co. v. Dudley*, 14 N. Y. 336; *Whalen v. Hudson Hotel Co.*, 183 App. Div. 316.) Causes of action have been improperly united in the complaint. (*Bartol v. Walton & Whann Co.*, 92 Fed. Rep. 13; *O'Connor v.*

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V. P. & P. Co., 184 N. Y. 46; *M. L. Ins. Co. v. Gillette*, 119 App. Div. 430; *U. G. Co. v. Eisner*, 22 App. Div. 1; *Raegener v. McDougall*, 33 App. Div. 231; *Geneva Mineral Spring Co. v. Coursey*, 45 App. Div. 268; *Dickerson v. Appleton*, 123 App. Div. 903.)

HISCOCK, Ch. J. This action was brought by the plaintiff seeking rescission of a subscription made by him for one hundred shares of the capital stock of the defendant corporation and to have repaid to him the sum of \$10,000 paid on such subscription plus interest and less dividends; also to have rescinded a contract of employment made by him with said corporation with an accounting for damages claimed to have been sustained by him under said contract. This relief is sought upon the ground that the plaintiff was induced to make said subscription and contract by the fraudulent representations of the individual defendant acting in behalf of said corporation.

Each defendant has separately demurred to the complaint on various grounds of which the one that said complaint does not state facts sufficient to constitute a cause of action alone requires any serious consideration.

Scattered through a long and somewhat diffuse complaint are allegations to the following effect: Prior to January, 1907, plaintiff with other individuals was in the employ of a partnership composed of the defendant Lurie and another person. Said defendant represented to plaintiff that a corporation was to be formed to take over said business with a capital stock of \$200,000 which was to be paid in full in cash and property; that said other individuals, who with plaintiff were the employees and associates of said defendant, were to take stock in the corporation and pay for the same in full in cash. Thereupon and in reliance upon said representations plaintiff subscribed for one hundred shares of said capital stock paying to the defendant Lurie \$10,000 by

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him to be turned over to the corporation when organized for said stock, and said subscription on the organization of said corporation shortly thereafter was consummated, said money being paid to it and plaintiff receiving the stock scrip; that at the time he represented to plaintiff that subscriptions for said capital stock were to be paid in cash and property the defendant knew that this was not to be done and that subscriptions were not thus to be paid, and intentionally and falsely misrepresented said facts to plaintiff; that as matter of fact nearly \$40,000 of subscriptions to the stock by various individuals who had been mentioned by defendant to plaintiff were never paid, in some cases notes given therefor still remaining unpaid and in some cases any obligation to pay for the stock being totally repudiated.

It is also alleged as bearing on the subject of employment that plaintiff while in the employ of the copartnership which preceded the corporation worked as a salesman and received compensation on a commission basis determined by his sales; that the defendant Lurie represented to plaintiff that the profits of the copartnership had been large and that those of the corporation would be still larger and that it would be to his benefit in connection with his stock subscription to enter the employment of the corporation on a fixed salary rather than on a commission basis which the plaintiff did, continuing in such employ for several years; that these various representations were false and fraudulent. Several reasons are alleged as explaining plaintiff's failure to discover the falsity of the representations which were made to him and to bring this action for rescission and restoration more promptly.

These allegations, together with various formal ones which it is not necessary to summarize, set forth a cause of action against the corporation.

While the representations of the individual defendant

through which plaintiff was induced to subscribe for stock and enter into the contract of employment related to something which was to occur in the future in the way of organization of the corporation and payment for its stock in full with property and cash, we think the allegations in the complaint describe a case where a defendant has fraudulently and positively as with personal knowledge stated that something was to be done when he knew all the time it was not to be done and that his representations were false. It is not a case of prophecy and prediction of something which it is merely hoped or expected will occur in the future, but a specific affirmation of an arrangement under which something is to occur, when the party making the affirmation knows perfectly well that no such thing is to occur. Such statements and representations when false are actionable within the authority of *Adams v. Gillig* (199 N. Y. 314). Therefore, we think that a cause of action is alleged against the defendant corporation for rescission of the stock subscription and restoration of the money paid by the plaintiff thereon with proper credits and debits for dividends and interest.

It is more doubtful whether any cause of action has been stated for rescission of the contract of employment made by the plaintiff with the corporation. It is, however, unnecessary to pursue this question to a final determination for plaintiff needs no equitable relief on that subject to protect whatever rights he has. His contract with the corporation is not alleged to have been for any definite time and, therefore, he could terminate it whenever he wanted to. Furthermore, no ground is made out in his complaint for any accounting for damages. It does not appear that the contract which he had with the preceding partnership was for any definite time beyond 1906 and that he, therefore, lost anything by abandoning it, and there is no allegation which indicates

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that if he had not taken the contract which he did with the corporation he would have done better anywhere else or under any other contract he could have secured.

The demurrer of the individual defendant is well made. In this action for rescission no cause of action is alleged against him. In making the alleged false representations he acted on behalf of the corporation and the money paid by plaintiff to him was so paid for the purpose of being turned over to the corporation for stock and was in fact so turned over. It is not necessary to consider what his liability would have been in some other form of action; he certainly is not a necessary or proper party to this action and no ground for relief is stated as against him.

Therefore, the judgment sustaining the demurrer of the individual defendant and dismissing the complaint should be affirmed, with costs, and the judgment sustaining the demurrer of the corporation defendant and dismissing the complaint should for the reasons stated be reversed, and the judgment of the Special Term as to such defendant affirmed, with costs in this court and the Appellate Division.

CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ., concur; McLAUGHLIN, J., not voting.

Judgment accordingly.

SUSAN D. BRIGHTSON, Appellant, *v.* JOHN CLAFLIN,
Respondent.

Pledgor and pledgee — conversion — stock pledged to secure payment therefor — when dividends declared on stock are cash and should be applied on the indebtedness — sale of pledged stock with accumulated dividends thereon unlawful — rights and remedies of pledgor.

1. Under ordinary circumstances it is the right of a pledgee of stock to collect dividends declared thereon and it is his duty to apply them to the reduction of the indebtedness for which the stock is held

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as security. He represents not only his own interests as pledgee but also holds a duty to the pledgor.

2. Where dividends have been declared on stock but have not yet become payable a proper sale of the stock would necessarily be made with the forthcoming dividend still on it. But where dividends declared have been paid and have passed into the possession of the pledgee they are not a subject of sale.

3. Plaintiff's assignor subscribed for shares of the capital stock of the corporation of which defendant was president. He did not pay for the stock which was issued to him and in his name, but instead gave his notes to the corporation therefor and the stock was left with and held by the corporation as security for the payment of the notes. The corporation declared dividends upon this stock, and these dividends were for a time either paid to plaintiff's assignor or applied on his indebtedness. Thereafter dividends declared on the stock, and which were represented by checks, were placed by the corporation in a special account and the checks held by it without application to such indebtedness until the dividends amounted to a considerable sum. Disagreements having arisen, plaintiff's assignor was discharged from defendant's employ and defendant by a notice signed in the name of the corporation notified the assignor that at a given time and place there would be sold the stock theretofore pledged "together with the rights to uncollected dividends" from a given date. Applying the dividends at their full amount and value the stock was sold for less than it was worth. Plaintiff's rights were based upon an assignment to her by the pledgor subsequent to this sale. *Held*, that the defendant was guilty of conversion. These dividends had been detached from the stock and had become cash or the equivalent of cash which could not lawfully be sold. His misconduct infected the sale of the pledged stock, which under proper conditions might have been sold. Inasmuch as part of the entire transaction was unlawful the whole of it necessarily becomes so. (*Wheeler v. Newbould*, 16 N. Y. 392, followed.)

4. Defendant was chargeable with knowledge of the law which condemned the step which he was about to take and the pledgor did no act which enticed him to believe that the act was lawful or that his conduct would be accepted and acquiesced in. Neither was there any such delay of action by the pledgor or the plaintiff as to sustain a conclusion of law that there was acquiescence in what had been done and a waiver of rights which might have existed.

5. The real damages as the case now stands are those which the pledgor suffered by reason of an improper and unlawful sale as the

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result of which there was realized a smaller sum than should have been realized for application on his indebtedness or for restoration to him in case there was a surplus over and above the indebtedness.

Brightson v. Claflin, 173 App. Div. 967, reversed.

(Argued January 21, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 24, 1916, affirming a judgment in favor of defendant entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Barclay E. V. McCarty for appellant. The respondent was the author of the auction sale of May 29, 1907; and, consequently, he was liable, personally, in conversion, in respect of any property that was converted by the process of that sale. (*Fishkill Inst. v. Bank*, 80 N. Y. 162; *Schultz v. U. S. Fidelity Co.*, 201 N. Y. 230; *Russell v. McCall*, 141 N. Y. 437; *MacDonnell v. Buffalo Co.*, 193 N. Y. 92; *Pease v. Smith*, 61 N. Y. 477; *Laverty v. Snethen*, 68 N. Y. 522.) The sale of the nineteen uncollected dividends, theretofore due and collectible, was illegal; and, consequently, all those uncollected dividends were converted by the process of that sale. (*Wheeler v. Newbould*, 16 N. Y. 392; *Jones on Collateral Securities* [3d ed.], §§ 651, 661, 692; *Gutman v. Schreiber*, 173 App. Div. 670; *Field v. Sibley*, 74 App. Div. 81; *Garlick v. James*, 12 Johns. 146; *Union Trust Co. v. Ringdon*, 93 Ill. 458; *Fletcher v. Dickinson*, 7 Allen [89 Mass.], 23; *Hill v. Newichawanick*, 71 N. Y. 593; 8 Hun, 459; *King v. Paterson, etc., R. R. Co.*, 29 N. J. L. [5 Dutch.] 504; *Laverty v. Snethen*, 68 N. Y. 522; *MacDonnell v. Buffalo Co.*, 193 N. Y. 92.) The stock was sold, not separately, but coupled, as one entity, with the nineteen unsalable dividends; and, consequently,

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the stock also was converted by the process of that sale. (*Lavery v. Snethen*, 68 N. Y. 522.) The plaintiff never lost, by "waiver or acquiescence," any right to object to the auction sale of May 29, 1907; for, on the trial court's findings of fact, five days before that sale took place, she warned the respondent, by written notice, that she declined to recognize the legality of the proposed proceeding. (*Glenn v. Garth*, 133 N. Y. 18; *New York Rubber Co. v. Rothery*, 107 N. Y. 310; *Muller v. Pondir*, 55 N. Y. 325.)

John L. Wilkie, Arthur F. Gotthold and George J. Thomson for respondent. The sale of the uncollected dividends did not constitute a conversion. (*Willoughby v. Comstock*, 3 Hill, 389; *Weir v. Dwyer*, 62 Misc. Rep. 7; *Nichols v. Eaton*, 26 N. Y. 410; *Milliken v. Dehon*, 27 N. Y. 366; *Strong v. Nat. M. B. Assn.*, 45 N. Y. 718; *Porter v. Parks*, 49 N. Y. 564; *Brooklyn Bank v. Barnaby*, 197 N. Y. 210; *Small v. Housman*, 208 N. Y. 115; *Barber v. Hathaway*, 47 App. Div. 165; *Huggans v. Fryer*, 1 Lans. 276; *Jones on Collateral Securities* [3d ed.], §§ 603, 651; *Chapman v. Brooks*, 31 N. Y. 75.) Plaintiff's right to object, if any, has been lost by waiver or acquiescence. (*Brown v. Bowen*, 30 N. Y. 519; *McPherson v. Rollins*, 107 N. Y. 316; *Erie Co. Savings Bank v. Roop*, 48 N. Y. 292; *Garnar v. Bird*, 57 Barb. 277; *Krantz Mfg. Co. v. Gould Storage B. Co.*, 83 App. Div. 133; *Hogan v. City of Brooklyn*, 52 N. Y. 282; *Schanz v. Sotscheck*, 167 App. Div. 202; *Manchester v. Braedner*, 107 N. Y. 346; *Shoemaker v. Benedict*, 11 N. Y. 176; *Brooklyn Bank v. Barnaby*, 197 N. Y. 210; *Matter of Kendrick*, 107 N. Y. 104.)

HISCOCK, Ch. J. This action is brought to recover for the alleged conversion, through sale, of certain stocks held as security and of dividends which had been declared thereon. The claim of conversion is predicated on the

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theory that the dividends which had been declared were equivalent to so much money and should have been collected and applied on the indebtedness instead of being sold; that inasmuch as the stock and the dividends were sold together the entire transaction was unlawful and there was a conversion of the stock as well as of the dividends. Out of many findings which although unanimously affirmed are frequently disregarded in the argument of the case a comparatively small number of simple and decisive facts may be gathered.

Plaintiff brings this action as the assignee of her husband, one George E. Brightson. Prior to September, 1890, there had been a copartnership under the name of H. B. Claflin & Company. At about the time mentioned as a successor to said copartnership there was organized a corporation known as the H. B. Claflin Company. Brightson, who had been in the employ of the copartnership, continued in the employ of the corporation and was permitted to and did subscribe for 200 shares of the capital stock issued by the latter at the price of \$20,000. He did not pay for the stock which was issued to him and in his name, but instead gave his notes to the corporation therefor and the stock was left with and held by the corporation as security for the payment of said notes. The corporation apparently declared regular dividends at the rate of eight per cent per annum upon this stock, and down to 1902 by amicable arrangement these dividends were either paid to Brightson or applied on his indebtedness. In 1902 disagreements arose, Brightson was discharged from the corporation, and thereafter dividends declared on the stock, and which were represented by checks, were placed by the corporation in a special account and the checks held by it without application to Brightson's indebtedness until these dividends amounted to between seven and eight thousand dollars.

Defendant was the president of the corporation and in 1907 by a notice signed in the name of the corporation by himself he notified Brightson that at a given time and place there 'would be sold the stock theretofore pledged "together with the rights to uncollected dividends since October 1st, 1902." Apparently for the reason that there had been some claim by plaintiff of a prior assignment to her by her husband of his stock or rights thereunder, similar notice was also given to her. She responded with a communication in which, without admitting the legality of the notice or the right to sell the stock, she requested certain information. Brightson, without having made any prior communication, attended at the time and place of sale together with a representative of a brokerage house who bid off the stock and uncollected dividends as a single transaction and thereafter "said sale was completed by the delivery by the H. B. Claflin Company of said stock certificates and uncollected dividends," and by inference the proceeds of the sale were applied to the indebtedness against Brightson held by the corporation for which the defendant was acting. The findings do not show any relation between Brightson and the broker and do not indicate that the bid by the latter was through concert of action with the former or for his benefit. They do indicate that applying the dividends at their full amount and value, the stock was sold for less than it was worth.

It is found in respect of both plaintiff and her husband that neither one either at the time of sale or previous thereto protested or asserted "that the method of realizing upon the uncollected dividends by selling a right to them was unauthorized or wrongful," and on these findings the conclusion of law is reached "that the plaintiff by her failure and the failure of her assignor, George E. Brightson, to protest or to assert that the method of realizing upon the uncollected dividends by

selling a right to them was unauthorized or wrongful has lost by waiver or acquiescence the right, if any, to object to said sale of said dividends and of said stock."

Plaintiff's rights are based upon and measured by an assignment to her by her husband subsequent to this sale of all of his claims against the defendant by reason of the alleged conversion of said stock and dividends upon this sale. While there are suggestions of and arguments based upon some supposed assignment by Brightson to his wife prior to said sale, that fact if it existed is not before us by a finding or in any other proper manner.

We think that the defendant was guilty of conversion. If it would have been unlawful for his principal, the pledgee, to do the acts which he did then he was not protected and his conduct was unlawful.

It is well settled that under ordinary circumstances it is the right of a pledgee of stock to collect dividends declared thereon and that it is his duty to apply them to the reduction of the indebtedness for which the stock is held as security. He represents not only his own interests as pledgee but also holds a duty to the pledgor. (*Guaranty Co. v. East Rome Town Co.*, 96 Ga. 511, 513; *McAulay v. Moody*, 128 Cal. 202; *Maxwell v. National Bank*, 70 So. Car. 532; *Reid v. Caldwell*, 120 Ga. 718; *Union Trust Co. v. Hasseltine*, 200 Mass. 414, 417; *Meredith Vil. Savings Bank v. Marshall*, 68 N. H. 417; *Gillet v. Bank of America*, 160 N. Y. 549, 560.)

Where a dividend has been declared on stock but has not yet become payable a proper sale of the stock would necessarily be made with the forthcoming dividend still on it. But where dividends declared have been paid and have passed into the possession of the pledgee they are not a subject of sale. These dividends have been detached from the stock and at least under such circum

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stances as are disclosed in this case have become cash or the equivalent of cash. The dividends which we are considering here were declared by the pledgee itself; they had come off from the stock long before the sale and their complete detachment therefrom and their conversion into cash or the equivalent thereof is sufficiently indicated by the fact that the corporation had issued checks for these dividends and which checks were at the time of the sale in its possession as pledgee. There is no principle of law or common sense which authorizes a pledgee to sell cash at a public auction. It is his duty to apply it to the reduction of the indebtedness as security for which the stock is held off from which the dividends have come. This rule is sufficiently established in this state by the case of *Wheeler v. Newbould* (16 N. Y. 392) where it was held that it was the duty of a pledgee to collect notes and mortgages and not sell them at auction. It is true that that action was not one of conversion. It is not accurate to say, as is said, that what was written in respect of the lack of right of a pledgee to sell instruments for the payment of money instead of collecting them, was dictum. That question was one of those directly involved in the case and properly before the court. Its disposition is controlling in this case where the facts are much stronger in favor of the plaintiff. (See, also, *Union Trust Co. v. Hasseltine*, *supra*; *Hallack L. & M. Co. v. Gray*, 19 Colo. 149.)

It being improper and unlawful for the defendant to sell money his misconduct infected the sale of the pledged stock, which under proper conditions might have been sold. The sale which he made was a single, entire one of both stock and dividends. There is no way by which the sale of the two may be separated and inasmuch as part of the entire transaction was unlawful the whole of it necessarily becomes so.

As I stated, it has been held as matter of law "that

plaintiff by her failure and the failure of her assignor to protest or to assert that the method of realizing upon the uncollected dividends by selling the right to them was unauthorized or wrongful has lost by waiver or acquiescence the right, if any, to object to said sale.”

• It has not directly been found as matter of fact that plaintiff through estoppel or through waiver by acquiescence has lost her rights and there are no other findings which in our opinion support this conclusion of law. A consideration of what the plaintiff did is not very material. Her attempt to recover is based upon her rights as a subsequent assignee of her husband. But if her conduct were material it appears that she in substance questioned the right of defendant to make the sale he did. So far as her assignor is concerned it simply appears that after receipt of defendant’s notice he made no protest, that he attended the sale (although it does not appear that either directly or through another he made a bid), and that no action was brought by him or upon his rights for three or four years. These facts certainly did not justify the conclusion as matter of law which has been made. We think there was no element of estoppel anywhere present. The defendant was acting in hostility to the assignor. He was proposing, not to act in accordance with the wishes or advice of the assignor, but to enforce the legal rights of his principal. Defendant was chargeable with knowledge of the law which condemned the step that he was about to take and the pledgor did no act which enticed him to believe that the act was lawful or that his conduct would be accepted and acquiesced in. So far as the findings show each party stood on his rights. The plaintiff was under no obligation to speak and there is no chance for the defendant to claim that he has been misled. (*Alsens A. P. C. Works v. Degnon Cont. Co.*, 222 N. Y. 34, 37; *Rothschild v. Title Guarantee & Trust Co.*, 204 N. Y. 458; *Newhall v. Hatch*, 134 Cal. 269, 274;

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Beechley v. Beechley, 134 Ia. 75; *Sheffield Car Co. v. Hydraulic Co.*, 171 Mich. 423; *N. Y. Rubber Co. v. Rothery*, 107 N. Y. 310; *Shakman v. U. S. Credit System Co.*, 92 Wis. 366; *Maple v. Kussart*, 53 Penn. St. 348; *Wilmore v. Stetler*, 137 Ind. 127; *Baker v. Seavey*, 163 Mass. 522; *Barnett v. Kamp*, 258 Mo. 139; *Rudd v. Matthews*, 79 Ky. 479.)

Neither has there been in our opinion any such delay of action by the pledgor or the plaintiff as to sustain the conclusion as matter of law that there was acquiescence in what had been done and a waiver of rights which might have existed. A failure to act in repudiation of something which has been done may often be evidence of acquiescence and through such delay there may arise under some circumstances such a condition of estoppel as will prevent an injured party from securing relief. It is sufficient to say that in this case we do not find these elements as matter of law at least.

The findings contain some evidence that if the dividends had been properly applied to the payment of Brightson's indebtedness and the stock sold there would have been realized several thousand dollars more than was realized by the proceedings which were indulged in, and, therefore, there should be a new trial. This being so we think that we should indicate to some extent the rule of damages which should be followed and our entire dissent from the one which plaintiff is urging.

It is insisted that plaintiff should be allowed to recover as damages the entire and aggregate amount made up of dividends and of the value of the stock without any reference to the indebtedness for which the stock was held. This, in our opinion, would be a most unreasonable and unjust conclusion. The stock and dividends were held as security by the Clafin Company for a debt which was unpaid and unquestioned. If plaintiff had sued it for the alleged conversion there is no question

that in proving her damages she would have been compelled to make allowance for the indebtedness which was a claim upon the stock and payable out of the proceeds of the sale. (*Baker v. Drake*, 53 N. Y. 211, 220; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Garlick v. James*, 12 Johns. 146; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269; *Shaw v. Ferguson*, 78 Ind. 547; *Work v. Bennett*, 70 Penn. St. 484; *Hallack L. & M. Co. v. Gray*, 19 Colo. 149.)

We do not doubt that the same rule in this respect which would have been applied for the benefit of the pledgee is applicable for the benefit of defendant who was acting for it and in its behalf. It is to be inferred from the findings that the proceeds of the sale were applied to the reduction of Brightson's indebtedness. The corporation would have been entitled to apply to the indebtedness held by it the proceeds of the sale and to have this taken into account in determining the amount of damages suffered by the wrongful conduct of the sale. When it acted through the defendant, its agent and representative and the proceeds were so applied, we feel clear that this reduction with the proceeds of the pledgor's indebtedness must be taken into account in estimating plaintiff's damages. The real damages as the case now stands are those which the pledgor suffered by reason of an improper and unlawful sale as the result of which there was realized a smaller sum than should have been realized for application on his indebtedness or for restoration to him in case there was a surplus over and above the indebtedness.

While that question is not now before us and we do not intend to decide it finally we have doubts whether it was necessary for the defendant to set up these facts by way of answer. If they were inherent in the evidence which plaintiff would be compelled to give to prove her damages it would hardly seem to be necessary to set

them up. We leave that question for further consideration, if necessary.

The judgments should be reversed and a new trial granted, with costs to abide the event.

CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ., concur.

Judgments reversed, etc.

EMILY G. K. BAUMANN, Appellant, *v.* THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK, Respondent.

SAME, Appellant, *v.* SAME, Respondent.

Insurance (accident) — application of Insurance Law (Cons. Laws, ch. 28, § 107, as amd. by L. 1913, ch. 155, and § 58, as amd. by L. 1906, ch. 326).

1. The provision of the Insurance Law (Cons. Laws, ch. 28, § 107, as amd. by L. 1913, ch. 155) that the falsity of any statement in the application shall not bar a recovery unless made with intent to deceive applies only to policies issued after January 1, 1914.

2. An annual receipt issued by the company to the insured on the policy issued to him at an earlier date for a period of twelve months, with the privilege of annual renewals, is not in effect a re-issue of the policy so as to bring it within the meaning and operation of section 107 of the Insurance Law, as amended in 1913.

3. The provision of section 58 of the Insurance Law that every policy of insurance issued or delivered "on or after January 1, 1907, by any life insurance corporation shall contain the entire contract between the parties * * * and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties," is by its express words limited to policies issued "by any life insurance corporation," and has no application to accident insurance.

Baumann v. Preferred Accident Ins. Co., 174 App. Div. 871, affirmed.

(Argued December 11, 1918; decided February 25, 1919.)

APPEAL in each of the above-entitled actions from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 5, 1916, affirming a judgment in favor of defendant entered upon a verdict directed by the court.

The nature of the actions and the facts, so far as material are stated in the opinion.

John B. Stanchfield, George M. Pinney, Frederick W. Kobbe and J. Arthur Leve for appellant. In so far as the defendant company insured against death by accident as provided in the policies, it is to be deemed a life insurance corporation and comes within the purview of section 58 of the Insurance Law (L. 1906, ch. 326) which took effect January 1, 1907. (*Moore v. Prudential Casualty Co.*, 170 App. Div. 849.) Under section 107 of the Insurance Law, as amended by chapter 155, Laws of 1913, which became operative January 1, 1914, the statement with reference to prior insurance appearing in the application and in the policies sued on, even if deemed to have been made by Gustav Baumann, was a representation or statement and not a warranty. (*Ogden v. N. Y. Mut. Ins. Co.*, 8 Bosw. 248; *Hodgson v. Preferred Acc. Ins. Co.*, 100 Misc. Rep. 155; 182 App. Div. 381; *Brady v. N. W. Ins. Co.*, 11 Mich. 425; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 167; *Bickford v. Aetna Ins. Co.*, 101 Maine, 130; *MacArthur v. U. S. Health & Accident Ins. Co.*, 151 Ill. App. 515; *DeJernette v. Fidelity & Casualty Co.*, 98 Ky. 563; *Grocery Co. v. U. S. Fidelity & Guaranty Co.*, 130 Mo. App. 430.) The incorrect statement as to any prior rejection for life insurance, inserted by the defendant itself, and not by Mr. Baumann, was not, as matter of law, material to the risk assumed by the defendant company in issuing the two accident policies which insured Mr. Baumann against death by

accident alone, as therein provided. (Richards on Ins. Law [3d ed.], § 101; *Armour v. T. F. Ins. Co.*, 90 N. Y. 450; *Kidder v. Order of Golden Cross*, 192 Mass. 326; *Ætna L. Ins. Co. v. Claypool*, 128 Ky. 43; *Price v. Standard L. & A. Ins. Co.*, 90 Minn. 264; *Continental Casualty Co. v. Owen*, 131 Pac. Rep. 1084; *Life Ins. Co. v. Judge*, 191 Penn. St. 484.) As the incorrect statement with reference to Mr. Baumann's prior rejection for a particular form of life insurance was not made by him but by the defendant's own agent, the policies should not thereby be vitiated, Mr. Baumann having acted throughout in perfect good faith and there being no evidence that the error was ever brought to his notice. (*Wilder v. P. M. A. Assn.*, 14 N. Y. S. R. 365; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Mowry v. Rosendale*, 74 N. Y. 360; *Grattan v. Met. Life Ins. Co.*, 80 N. Y. 293; 92 N. Y. 284; *Miller v. Phœnix Mut. Life Ins. Co.*, 107 N. Y. 301; *Sternaman v. Met. Life Ins. Co.*, 170 N. Y. 27; *Mead v. S. & W. F. Ins. Co.*, 81 App. Div. 285; *Kenyon v. Knights Templars Aid Assn.*, 48 Hun, 283; *Malara v. Prudential Ins. Co.*, 147 App. Div. 578; *Dunbar v. Phœnix Ins. Co.*, 40 N. W. Rep. 386; *Temminck v. Met. Life Ins. Co.*, 40 N. W. Rep. 469.)

William D. Guthrie and *George W. Sill* for respondent. The insured must be held bound by the provisions of the policies sued on. (*Hook v. M. M. L. Ins. Co.*, 44 Misc. Rep. 478; 139 App. Div. 922; *Enthoven v. American Fidelity Co.*, 128 N. Y. Supp. 805; 150 App. Div. 928; 211 N. Y. 561; *Quinlan v. P. W. Ins. Co.*, 133 N. Y. 356; *Carmichael v. J. H. Mut. L. Ins. Co.*, 116 App. Div. 291; *May v. N. Y. S. R. F. Society*, 14 Daly, 389; *Taufer v. Brotherhood of Painters*, 137 App. Div. 838; *Tilton v. Farmers Ins. Co.*, 82 Misc. Rep. 79; *Gioia v. Met. Life Ins. Co.*, 97 Misc. Rep. 380, 383; *Bollard v. N. Y. L. Ins. Co.*, 98 Misc. Rep. 286; *Lumber Underwriters v.*

Rife, 237 U. S. 605; *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613.) The proof of prior rejection by the Penn Mutual Life Insurance Company established a breach of warranty. (*Kemp v. Good Templars*, 64 Hun, 637; 135 N. Y. 658; *Gaines v. Fidelity & Casualty Co.*, 188 N. Y. 411; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *Clemans v. S. A. R. of G. F.*, 131 N. Y. 485; *Wolowitch v. National Surety Co.*, 152 App. Div. 14; *Heintz v. Continental Casualty Co.*, 121 App. Div. 75; *Desmond v. Supreme Council*, 51 App. Div. 91; *Enthoven v. American Fidelity Co.*, 150 App. Div. 928; 211 N. Y. 561; *Feinstein v. Massachusetts Bonding & Ins. Co.*, 171 N. Y. Supp. 589; *Webb v. Security Mutual Life Ins. Co.*, 126 Fed. Rep. 635; *Wyss-Thalmann v. Maryland Casualty Co.*, 193 Fed. Rep. 55; *Pacific Mutual L. Ins. Co. v. Glaser*, 245 Mo. 377; *Bonewell v. North-American Accident Ins. Co.*, 160 Mich. 137.) Section 107 of the Insurance Law, as amended by chapter 155 of the Laws of 1913, is not applicable to policies issued and delivered in 1907. (*Enthoven v. American Fidelity Co.*, 128 N. Y. Supp. 805; 150 App. Div. 928; 211 N. Y. 561; *Perry v. Prudential Ins. Co.*, 144 App. Div. 780; *Caesar v. Bernard*, 156 App. Div. 724; 209 N. Y. 570; *People ex rel. Beaman v. Feitner*, 168 N. Y. 360; *Standard A. & L. Ins. Co. v. Wood*, 82 Atl. Rep. 702; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221, 242; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Easton v. Pickersgill*, 55 N. Y. 310; *Grimmer v. Tenement House Department*, 205 N. Y. 549; *People ex rel. Werner v. Prendergast*, 206 N. Y. 405.)

CUDDEBACK, J. There are two actions shown in the record upon policies of accident insurance issued by the defendant to Gustave Baumann, the plaintiff's deceased husband.

It will be sufficient if what is said here is confined to the policy in action No. 1. That policy is one of five,

of which two were for accident and three for health insurance, issued to Baumann February 27, 1907. We are not concerned with the health policies now. Baumann was accidentally killed October 14, 1914, by falling from the roof of a building in New York city.

The policies were all issued on one application. That application showed in paragraph 11 the following:

"11. No application ever made by me for accident, health or life insurance has been declined, except as follows: No exceptions."

The policy of insurance contained a schedule of warranties made up of the statements in the application, including paragraph eleven aforesaid. The defense is that this statement in paragraph eleven was a warranty and was untrue, in that the deceased had in the month of February, 1904, made application to the Penn Mutual Life Insurance Company of Philadelphia for a policy of life insurance, and that such application had been denied by the Penn Company.

At the close of the evidence the trial judge directed a verdict for the defendant.

The argument of the plaintiff's counsel is that subdivision f, section 107 of the Insurance Law, and also section 58 of the law govern the case, and that under such sections, the statement of the deceased that no application made by him for accident, health or life insurance had been declined, is a representation and not a warranty. Furthermore, that it was a question of fact for the jury to decide whether such representation was material or not, and hence the trial court erroneously directed a verdict for the defendant.

Subdivision f, section 107 of the Insurance Law (Cons. Laws, ch. 28), reads as follows:

"Subdivision f. The falsity of any statement in the application for any policy covered by this section shall not bar the right to recover thereunder unless such false

statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer."

Section 107 of the Insurance Law, by its opening sentence, applies only to policies issued after January 1, 1914. The policy to Baumann in this case was issued in 1907. On the face of it, section 107 does not apply to Baumann's policy. But the plaintiff insists that the renewal of the policy on February 6, 1914, was in effect a re-issue of the policy as of that date, and hence subdivision f applies.

If the renewal receipt issued to Baumann in 1914 was a re-issue of the policy of insurance, and the policy in consequence is covered by subdivision f of section 107, then it must also be true that the policy is covered by the other subdivisions of the section. It must follow furthermore, as a general rule, that all policies of accident and health insurance continued in force by renewal certificates issued after January 1, 1914, are covered by section 107.

Section 107 is in the main a new section added to the Insurance Law in 1913 (L. 1913, ch. 155) establishing certain standard provisions to be inserted in health and accident insurance policies issued after January 1, 1914, and laying down certain rules to be observed in the construction and interpretation of such policies. It was not to be expected that policies previously issued under other and different statutes would conform to the provisions of the new section. In fact, it was designed to effect a change in the form and substance of health and accident policies, and make those thereafter issued more favorable to the insured. The old policies continued in force by renewal certificates could not conform to section 107 without being re-drawn, and no intention is manifested in the statute to touch the policies at the time in force.

In the present case, the policy of insurance is not set out in full in the record, but so far as it appears, the policy does not contain any considerable part of the many standard provisions prescribed by section 107. For example, it does not say, as section 107 requires, that the policy contains the entire contract of insurance, or a provision for the reinstatement of the policy in case it becomes subject to avoidance for default in payment of the agreed premium. Neither does it appear that the policy is printed in the style and type required by section 107, and the provision for insuring the beneficiary seems to be in direct conflict with subdivision b of section 107, which says no policy shall insure more than one person.

The policy issued to Baumann in 1907, it is true, insured him only for a period of twelve months, but it contemplated an annual renewal and provided that certain benefits and advantages would accrue to the insured in the subsequent years during which the policy might be continued. The amount of insurance increased very materially the longer the policy was in force. It was kept alive by renewal certificates issued annually. The renewal certificate issued in 1914 says that in consideration of the premium paid, the insurance company "does hereby continue in force" the policy (describing it) for one year, subject to all its terms and provisions, not the terms and provisions of section 107. The renewal certificate is simply a contract to continue in force a pre-existing policy of insurance.

Section 58 of the Insurance Law, the other section on which the plaintiff's counsel bases his argument, reads in part as follows:

"§ 58. Every policy of insurance issued or delivered within the state on or after January 1, 1907, by any *life insurance corporation* doing business within the state shall contain the entire contract between the parties

* * * and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties."

By its express words, this section is limited to policies issued "by any life insurance corporation." The defendant is an accident insurance corporation and the policy issued to Baumann was an accident policy and covered the life of the insured only when death resulted from bodily injury effected solely through external, violent or accidental means.

It seems impossible that the experienced insurance men who framed the Insurance Law failed for a moment to have in mind the distinction between life insurance and accident insurance. The law is full of provisions which distinguish between them. Even in popular speech, life insurance and accident insurance mean entirely different things.

Section 58 of the Insurance Law, relating to warranties or representations in life insurance policies, seems to be a section corresponding with subdivision f and other subdivisions of section 107 relating to accident and health insurance.

It is sufficient to say that accident insurance is not within the language of section 58 and could not have been within the contemplation of its framers.

The plaintiff's counsel cites no authoritative decision to sustain his construction of the Insurance Law, but applying the ordinary rules of statutory construction, sections 107 and 58 do not cover the plaintiff's case.

The statement, therefore, in paragraph 11 of the application, where the insured said, "No application ever made by me for accident, health or life insurance has been declined, except as follows: No exceptions," must be taken and construed as a warranty. Confessedly, the statement was untrue and the breach of warranty is fatal to the plaintiff's cause of action. (*Gaines v. Fidelity & Casualty Co. of N. Y.*, 188 N. Y. 411, 415; *Foot v.*

Ætna Life Ins. Co., 61 N. Y. 571.) As Judge GRAY said in the *Gaines* case:

"The parties to this contract had the right to make any statements of fact material thereto and conditions precedent to any liability thereupon, all things being equal at the time in their attitude to each other, and if they proved false the contract was avoided."

The conclusion reached makes it unnecessary to consider any of the other points raised by the plaintiff's counsel, except, perhaps, one. The plaintiff's counsel argues in the one point referred to, that the statement in Baumann's application that he had never been refused life, health or accident insurance was in fact placed there by the defendant. It appears that the application signed by Baumann and delivered to the defendant contained a statement that no application had ever been declined and that the defendant's officers with a rubber stamp added the two words, "No exceptions." I do not think these facts support the counsel's argument. The stamping of the words "No exceptions" after the statement simply emphasized its materiality in the minds of the defendant's officers. They called the attention of any one examining the paper to the representation and said in effect, "N. B. He makes no exceptions."

I recommend that the judgment in each case be affirmed, with costs.

HISCOCK, Ch. J., CHASE, CARDOZO, POUND and ANDREWS, JJ., concur; COLLIN, J., not voting.

Judgments affirmed.

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Statement of case.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JOSEPH TALEISNIK, Appellant.

Crimes — seduction — evidence — indictment for seduction under promise of marriage — corroboration required to support testimony of complainant — judgment of conviction reversed on ground that corroborating evidence is insufficient.

1. It is required by way of corroboration of the testimony of a complainant on the trial of an indictment for seduction under promise of marriage (Penal Law, § 2177) that there should be some fact deposed to, independently altogether of the evidence of the complainant, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. Such corroboration must be of a character which tends to prove the defendant's guilt by connecting *him* with the crime, and if there be no such evidence tending to connect the defendant, a question of law is presented reviewable by this court. The corroborating evidence must be such as tends to connect the defendant with the sexual act.

2. The defendant was convicted of the crime of seduction under promise of marriage (Penal Law, § 2175), and judgment of conviction has been unanimously affirmed by the Appellate Division. The woman testified that under a promise of marriage defendant seduced her and detailed the circumstances. She also stated that the accused accompanied her to a doctor's office where he admitted that she was his wife. The doctor was called and stated that the woman called with a man who represented himself to be her husband but whom he failed to identify as the defendant. The court refused a request to charge the jury that they could not consider the testimony of the doctor or any part of it as being corroborative evidence. *Held*, error.

3. A witness testified that in response to a question as to the time of his marriage to complainant, defendant stated that "physically, spiritually, bodily and morally they were married, ritually they would be married very soon." The court erroneously refused to charge the jury that if these words were employed, still "if they find that they were used at a time and under such circumstances as to indicate that they were not intended by the defendant as an assertion that he had had sexual intercourse with the prosecutrix, that they cannot then consider such testimony as being corroborating evidence of the act of sexual intercourse."

People v. Taleisnik, 186 App. Div. 905, reversed.

(Argued January 20, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 15, 1918, which affirmed a judgment of the Kings County Court rendered upon a verdict convicting the defendant of the crime of seduction under promise of marriage.

The facts, so far as material, are stated in the opinion.

Robert H. Elder and *Otho S. Bowling* for appellant. The court erred in refusing to charge this request: "I request your Honor to charge that they cannot consider the testimony of Dr. Huber, or any part of it, as being corroborating evidence in this case." (Code Crim. Pro. § 399; Penal Law, §§ 2013, 2177; 3 Wigmore on Ev. §§ 2059-2062; *People v. Farina*, 134 App. Div. 110; *People v. Cole*, 134 App. Div. 759.)

Harry E. Lewis, District Attorney (*John E. Ruston* and *Harry G. Anderson* of counsel), for respondent. The court properly admitted the testimony of Dr. Huber and properly refused to charge the jury that they could not consider the same as being corroborative evidence. (*People v. Sweeney*, 213 N. Y. 37; *Cronin v. Lord*, 161 N. Y. 90; *Wilson v. K. C. El. R. R. Co.*, 114 N. Y. 487; *People v. Fernandez*, 35 N. Y. 49; *Siedensspinner v. Met. Life Ins. Co.*, 175 N. Y. 95; *Ostrander v. Snyder*, 73 Hun, 378; 148 N. Y. 757; 1 Jones' Comm. on Ev. 893; *Deal v. State*, 140 Ind. 354; *People v. O'Sullivan*, 104 N. Y. 481; *People v. Page*, 162 N. Y. 272; *People v. O'Farrell*, 175 N. Y. 323.)

CRANE, J. Two refusals of the trial court to charge the jury in this case have raised such substantial points of law that they require careful consideration irrespective of what we may think of the defendant's guilt.

The defendant was convicted of the crime of seduction in the County Court of Kings county and sentenced to

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the penitentiary. The judgment has been unanimously affirmed by the Appellate Division. The prosecutrix, named Helen Levine, was a trained nurse, twenty-three years of age, residing with her sister and brother-in-law at 663 Howard avenue in the borough of Brooklyn, city of New York — a four-room apartment. The defendant, thirty-four years of age, was in the newspaper business, residing in the same borough. That the parties had become engaged to be married was established beyond doubt. Both families were acquainted with their intentions. Presents had been given and the trousseau partially prepared. For some reason the man refused to marry the woman and she repaired to the Police Court and swore out a warrant, charging him with having seduced her. She testified that on the night of June 7th, 1917, in the bedroom of her apartment the defendant under the promise of this marriage persuaded her to have illicit relations with him, and that the act was repeated on occasions thereafter. She did not become pregnant and the first knowledge that others had of the improper relationship was the public statement of the woman.

The corroboration of her story was attempted in three different ways: *First*, by the defendant's supposed acknowledgment of the deed in a casual conversation while at the table with the family. *Second*, by his alleged failure to specifically deny having had intercourse with her when asked by his friends to marry the girl whom they said he had ruined. And *third*, by the testimony of a doctor who says that Helen Levine called at his house for a vaginal examination with some man whom he could not identify.

The woman testified that she in company with the defendant called upon Dr. Frederick W. Huber at his office, 113 East Broadway, New York city, to make inquiries regarding certain pains which she felt internally — not from fear of pregnancy — and that the defendant

said she was his wife. The doctor testified that the man who called represented himself to be the husband of the woman.

The pertinent questions to this witness and the answers are these:

" Q. Do you remember that Miss Levine visited your office in company with a man?

" A. I do.

" Q. Are you able to identify the man that she came with on that occasion?

" A. No, sir.

" Q. Will you look at the defendant and state whether or not he is the man.

" A. I could not state that."

The defendant was in no way identified as the man who called with the prosecutrix except by her word. Yet Dr. Huber's testimony was submitted to the jury as evidence corroborating her account of the defendant's intercourse with her.

At the close of the charge this request was made by the defendant's counsel:

" I request your Honor to charge that they cannot consider the testimony of Dr. Huber or any part of it as being corroborative evidence in this case.

" The Court: Refused."

The question presented by this ruling is, therefore, as follows:

The woman testifies that under a promise of marriage a man seduced her and details the circumstances. She also states that the accused accompanied her to a doctor's office where he admitted his guilt. Her evidence alone is insufficient; this is readily acknowledged. She cannot create corroboration by multiplying incidents and events. The doctor is called who states that the woman called with some man, but he fails to identify the defendant and in fact does not identify him.

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How possibly does this corroborate the woman's statement that the man she brought there was the defendant? Does this testimony of the doctor identify the defendant or tend to connect him with the offense? The only word we have that the defendant was present in the doctor's office is the word of the woman. His connection with the case is dependent entirely upon her story. This is not slight evidence of corroboration; it is no evidence whatever.

Section 2177 provides that no conviction can be had for seduction under promise of marriage upon the testimony of the female seduced unsupported by other evidence. The other evidence must tend to connect the defendant with the commission of the crime, as stated in section 399 of the Code of Criminal Procedure regarding the testimony of accomplices. (*People v. Plath*, 100 N. Y. 590.) In *People v. O'Farrell* (175 N. Y. 323, 325) it was said of corroborating evidence:

"What appears to be required is, that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it."

It was also said that corroboration must be of a character which tends to prove the defendant's guilt by connecting *him* with the crime, and that if there be no such evidence tending to connect the defendant, a question of law is presented reviewable by this court.

In crimes of this nature the woman must be corroborated in two particulars: *First*, as to the marriage; *second*, as to the seduction. The corroborating evidence upon this latter point must be such as tends to connect the defendant with the sexual act. (*People v. Page*, 162 N. Y. 272; *People v. Hooghkerk*, 96 N. Y. 149-162.) In *People v. Cole* (134 App. Div. 759) it was said of a doctor's testimony regarding the pregnancy of the

woman that it simply proved that she had had sexual intercourse with some man, but was not corroborative of the plaintiff's testimony against the defendant. The court in *People v. Flaherty* (27 App. Div. 535-546), a trial for rape, charged the jury "the fact that the child was born is no evidence corroborating the claim of the people that this defendant is the guilty man." This was held to be correct. This case was reversed in 162 New York, 532, but this point was not mentioned. The rule in Massachusetts as stated in *Commonwealth v. Holmes* (127 Mass. 424) is not quite in accord with our own, although it is intimated that in charging juries the practice is the same.

The measure of corroboration required in the so-called sexual crimes (Penal Law, sections 2013, 2177, 2460, subdivision 9) is more than that demanded by section 395 of the Code of Criminal Procedure respecting confessions. The confession of a defendant is not sufficient to warrant his conviction without additional proof that the crime charged has been committed. The independent proof need only establish the *corpus delicti*; it need not connect or tend to connect the defendant with it. (*People v. Deacons*, 109 N. Y. 374, 378; *People v. Roach*, 215 N. Y. 592, 600.)

That the prosecutrix had with her some man as her husband was no evidence of corroboration against this defendant, unidentified.

As the other evidence of corroboration in this case was somewhat slim at the best, it cannot be said that this error in the refusal to charge was harmless.

Neither can it be said that the request only applied to corroboration of the prosecutrix generally and not to the element of seduction. The request was preceded by the following, which was charged by the court:

"I request your Honor to charge the jury that the law is that before they can convict they must find such

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corroborating evidence in this case, both as to the fact that there was sexual intercourse and that there was a promise of marriage which was used to accomplish the sexual intercourse."

After this follows the request above quoted and about which I am writing. It is clear to see, therefore, that the corroboration referred to was the corroboration of the testimony required by the Penal Law.

Just what is meant by general corroboration as distinguished from that required by section 2177 I do not quite comprehend. The posing of some man as the lady's husband without identifying him in any way is neither corroboration of the promise to marry or of intercourse as against the defendant. What does it corroborate? If the doctor had said she were pregnant, his testimony might help to establish that she had been with some man, so too, if he had said that she were no longer a virgin. But there is no such evidence in this case. The doctor fails to give the result of his physical examination, merely repeating Miss Levine's conversation with him, and his advice to them in these words:

"I told him what was to be done, or I said if she was willing to suffer pain a little longer, it probably may pass off." In fact it is apparent that the evidence of the doctor was only sought for the purpose of proving an acknowledgment by Miss Levine's companion that he was her husband.

Such attempted corroboration comes fairly within this sentence from the *Page* case: "A witness cannot generally be corroborated by proving declarations made out of court of the same facts testified to in court." (p. 275.)

One other request was made which we also think should have been charged. It appeared from the testimony of one Mildred Slote that she was at the dining-room table having a meal with Miss Levine and Mr. and Mrs.

Levine and the baby when the defendant who was present stated in reply to a question as to the time of his marriage with Miss Levine that

“Physically, spiritually, bodily and morally they were married, ritually they would be married very soon.”

No attention apparently was given to this remark by any one present; the conversation went on just the same without comment. It was said upon the trial that this was a confession by the defendant of his guilt and an acknowledgment of sexual intercourse with Miss Levine. The court was asked to charge as follows:

“I ask your Honor to charge that if they find that the words ‘spiritually, physically and morally married’ were employed, still, if they find that they were used at a time and under such such circumstances as to indicate that they were not intended by the defendant as an assertion that he had had sexual intercourse with the prosecutrix, that they cannot then consider such testimony as being corroborating evidence of the act of sexual intercourse.

“The Court: Refused.”

If the statement made by the defendant were meaningless or stated as a joke, or under such circumstances as to indicate to any one that it was not a confession of guilt, certainly the jury would not be justified in considering it as corroboration or as an admission of a fact. To refuse this request in our opinion was error. People will indulge occasionally in silly talk and joke by exaggeration. Such remarks could not be taken as admissions of actual occurrences if so stated that nobody would or did believe them. The request, we see, assumes them to be so spoken. The next request, which was charged, did not cure this error, as the jury were simply told that they might determine for themselves what the words meant. If they should determine, however, that they meant nothing — mere idle talk — yet, the court said they could use them

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as corroborating evidence required by the law. This is what the two requests amount to read together.

We need not discuss the other exceptions. Sufficient has been stated to lead us to the conclusion that a new trial should be granted. All that Miss Levine says may be true — the defendant did not take the stand and her story is not improbable or suspicious. Yet the law for years has required that the most likely story of the woman in these cases must be corroborated, and we are not justified in weakening this wise provision in order to reach a man whom all may think to be in the wrong.

The judgment should be reversed and a new trial granted.

McLAUGHLIN, J. (dissenting). The defendant was convicted of the crime of seduction under promise of marriage. The judgment of conviction has been unanimously affirmed by the Appellate Division and defendant now appeals to this court.

The statute under which the conviction was obtained provides as follows: "A person who, under promise of marriage, * * * seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than \$1,000, or both." (Penal Law, section 2175.) A conviction, however, cannot be had upon the testimony of the female seduced, unsupported by other evidence. (Penal Law, section 2177.) The unanimous affirmance of the judgment of conviction by the Appellate Division conclusively establishes, so far as this court is concerned, that the testimony of the female seduced was supported by other evidence. (*People v. Willett*, 213 N. Y. 368; *People v. Sweeney*, 213 N. Y. 37.)

But it is urged that certain errors, to which exceptions

were taken, were committed at the trial which call for the reversal of the judgment of conviction. Only two of these alleged errors are relied upon in the opinion of Judge CRANE and they seem to me to be the only ones of sufficient importance to merit consideration. The first relates to a request to charge with reference to the testimony of Doctor Huber and the second to a request to charge with reference to the testimony of the witness Slote. These two alleged errors will be considered in the order named, but in order to appreciate what seems to me to be a proper consideration of them it is necessary to briefly consider some of the evidence set out in the record.

Helen Levine in April, 1917, then between twenty-one and twenty-two years of age, after a short courtship accepted defendant's offer of marriage. The engagement was publicly announced. It was recognized and generally understood by the immediate relatives and friends of both of the parties. The defendant after the engagement treated Miss Levine as a prospective bride. He frequently called upon her, took her to places of amusement, gave her money from time to time, also different articles of clothing and in a general way assisted her in selecting and obtaining her wedding trousseau. The relation thus started, according to her testimony (defendant was not sworn at the trial nor was any witness produced in his behalf), continued until the night of the seventh of June following the engagement when he took her to a theatre. On their return to her home, which was in her brother-in-law's apartment, he went with her to her bedroom where he had frequently been before and induced her, in view of their prospective marriage, to have sexual intercourse with him. She testified that the act caused her much pain and discomfort, which fact was made known to him and shortly thereafter, at his suggestion, they consulted Doctor Huber, a physician in the city of New York. Upon entering the doctor's office, the

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defendant stated to him that the woman was his wife and that she experienced severe pain when sexual intercourse took place and that they had come to him for the purpose of ascertaining what the trouble was. The doctor took her into a private room in the office and made an examination of her person, at the conclusion of which he stated to both of them that the cause of the pain and discomfort was not uncommon with young girls recently married; that it could be relieved by treatment, but if she could put up with it for a short time, in his opinion, it would disappear; that thereupon they left agreeing to return, which they never did

Doctor Huber was sworn as a witness and he corroborated the testimony of the complaining witness as to her visit to his office with a man, what was said, the examination which he made of her person and the advice which he gave. He was then asked if he could identify the defendant as the man who accompanied her to his office and he said he could not. He did state, however, that he had known Miss Levine for upwards of fifteen years and that the occasion in question was the only time she had been to his office with a man, which also corroborated her statement to the same effect.

In submitting the case to the jury the trial court was requested to charge that the jury could not "consider the testimony of Doctor Huber or any part of it as being corroborating evidence in this case." The request was refused and an exception taken. I think the request was properly refused. It was equivalent to a motion to strike out all of Doctor Huber's testimony and there certainly was in it some evidence of corroboration. His testimony, as to the examination he made and what the examination disclosed, was admissible as showing a circumstance which tended to corroborate her testimony as to the illicit intercourse with the defendant. That such testimony was admissible is established by *People v. Orr*

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(92 Hun, 199; affirmed, on opinion below, 149 N. Y. 616). Nor does the decision in *People v. Page* (162 N. Y. 272) hold otherwise. In this connection, it may be a matter of interest to note that the sentence quoted from the opinion in the *Page* case by Judge CRANE did not receive the approval of a majority of the court. Indeed, a majority of the court did not approve of the opinion. Only two members agreed with the writer of the opinion; two concurred in the result; one dissented and the seventh did not sit.

It has many times been held in prosecutions for rape that it is proper to show the physical condition of the person raped, not that such physical condition tends to show the perpetrator of the crime but that the crime has been committed. So here it was competent for the People to show by an examination of the complaining witness made within a very short time after the offense is alleged to have taken place, that some one had had illicit intercourse with her and to this extent, at least, Doctor Huber's testimony corroborated her. It tended to show or at least the jury would have had a right to draw an inference that she had recently had illicit intercourse with some man, and from that and the other evidence in the case that the defendant was the person.

The second alleged error, as indicated, relates to a request to charge with reference to the testimony of the witness Slote. In this connection it appears that sometime after the crime is alleged to have been committed, and when it may fairly be inferred that there were rumors as to the danger of the engagement being broken, the witness Slote while taking lunch with the defendant, the complaining witness and several other persons, asked the defendant when he was going to be married to Miss Levine and he replied, according to her testimony, "physically, spiritually, bodily and morally they were married, ritually they will be married very soon." The

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court was asked to charge, referring to this conversation, "that if they find the words 'spiritually, physically and morally married' were employed, still if they find that they were used at a time and under such circumstances as to indicate that they were not intended by the defendant as an assertion that he had had sexual intercourse with the prosecutrix that they cannot then consider such testimony as being corroborating evidence of the act of sexual intercourse."

The request was refused and an exception taken. Personally, I do not think error was committed in refusing this request. The intent of the defendant in using the words had to be determined largely from what the words indicated, taken of course in connection with all the surrounding circumstances. But if it be assumed that error was thus committed it did not harm the defendant, and under section 542 of the Code of Criminal Procedure should be disregarded. The court had correctly charged the jury down to this point and immediately following the refusal to charge, defendant's counsel made the following request: "I request your Honor to charge that under the law they have the right to *consider that* and to say whether those words were employed and what they meant if they were employed." The court responded, "I so charge you, gentlemen." What the counsel had in mind by the use of the words "the right to consider that" was what he had asked the court to charge in the preceding request. The court, in charging the latter request, adopted counsel's suggestion and the jury must have so understood it. The latter request as charged was favorable to the defendant and fully protected his rights so far as the testimony of the witness Slote was concerned.

I think there was sufficient corroboration in this case. Corroboration may be by circumstantial evidence. (*Boyce v. People*, 55 N. Y. 644; *People v. Gumaer*, 80 Hun, 78.)

In actions of this character, the sexual intercourse and the immediate persuasions and inducements to bring about consent are very rarely proved by the evidence of third persons. They must from the necessity of the case be inferred from all the facts and circumstances connected with the parties involved; that the man had the opportunity and that the relation of the parties was such that there was likely to be that confidence on the part of the woman which induced her to consent. (*Armstrong v. People*, 70 N. Y. 38.)

The testimony of the witnesses Kaplan and Weinberg in a large measure corroborates the complaining witness. Kaplan and Weinberg were mutual friends of the parties. Each, having heard that the engagement was broken, sought to bring about a reconciliation and they, or at least one of them, after accusing the defendant of having ruined the complaining witness and having "lived with her as man and wife," suggested that he ought to marry her. The response which the defendant made to the suggestion was that the matter had gone too far; that she had dragged him into court (which must have referred to the institution of the present proceeding since no other is suggested); that he had offered her \$1,500 and a year's rest, and to support her with good food and clothes if she would not go to court; that she had gone to court and he would not marry her.

This testimony, which is uncontradicted, taken in connection with the other evidence in the case, I think fairly establishes the guilt of the defendant. He had a fair trial and there are no errors which call for a reversal. The judgment should be affirmed.

COLLIN, CUDDEBACK and HOGAN, JJ., concur with CRANE, J.; HISCOCK, Ch. J., and CHASE, J., concur with McLAUGHLIN, J.

Judgments reversed, etc.

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Statement of case.

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BROOKLYN ASH REMOVAL COMPANY, INC., Appellant, v.
ELLEN T. CONNELL, Respondent.

Replevin — contract — when action will lie to recover from owner possession of chartered scow.

A provision in a contract for the charter of a scow that "We (meaning the owner) will furnish a captain for each scow at our own expense, who will be under your control and orders but you are not to be responsible for the acts of any captain in the care, movement or navigation of said scows, and we will save you harmless, and defend you from any claims, actions or suits arising therefrom," does not defeat the effect of the instrument as a demise. Hence, where the scow had been delivered to the owner for repairs and she refused to return it, replevin will lie to recover possession. (*The Willie*, 231 Fed. Rep. 865; *Dailey v. Carroll*, 248 Fed. Rep. 466, followed.)

Brooklyn Ash Removal Co. v. Connell, 175 App. Div. 182, reversed.

(Argued January 20, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered December 13, 1916, modifying and affirming as modified a judgment in favor of defendant entered upon an order of Special Term granting a motion by defendant for judgment upon the pleadings.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank A. Clary for appellant. The charter gave the possession and control of the scow to the plaintiff. (*Hagar v. Clark*, 78 N. Y. 45; *Anderson v. Boyer*, 156 N. Y. 93; *Bissell v. Torrey*, 60 N. Y. 635; *The Willie*, 231 Fed. Rep. 865; *Dailey v. Carroll*, 248 Fed. Rep. 466.)

Nelson Zabriskie for respondent. Replevin cannot be maintained unless plaintiff has the exclusive possession, and the complaint shows that this is not a proper case for replevin as all that the plaintiff had under the charter

party was a "use" of the scow and a "use" cannot be replevied. (1 Parsons on Shipping & Admiralty, 278, 279; *Rogers v. Arnold*, 12 Wend. 30.)

CUDDEBACK, J. The defendant in this action was the owner of a scow, which, with other scows, she let and chartered to the plaintiff. The scows were to be used by the plaintiff for a term fixed, at a monthly rental, in and about New York harbor, in carrying out a contract with the street cleaning department of the city. The charter of the scows provided that the defendant should keep the same in repair. The plaintiff delivered the scow in question to the defendant for repair. The defendant made the repair and then refused to return the scow to the plaintiff. Thereupon the plaintiff brought this action in replevin against the defendant to recover possession of the scow.

The main ground on which the defendant refused to return the scow was the provision of paragraph two of the contract, which reads as follows:

"*Second.* We (meaning the defendant) will furnish a captain for each scow at our own expense, who will be under your control and orders but you are not to be responsible for the acts of any captain in the care, movement or navigation of said scows, and we will save you harmless, and defend you from any claims, actions or suits arising therefrom."

It is the claim of the defendant that she merely let the use of the scows to the plaintiff, and by the provision of paragraph two in the contract she at all times had possession of the scow so that an action in replevin will not lie. It seems to me that this argument of the defendant is not sound.

It is altogether a question of the intention of the parties, and we have only the contract to go by. The contract amounted to a demise of the scows to the plaintiff, which,

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of course, carried with it the right to possession, unless the contrary appears from paragraph two. Did the parties intend anything to the contrary by that paragraph which prescribed that the defendant should furnish a captain with the scow? If they did, the paragraph fails to show such intention.

What the duties of a captain of a scow may be is not set forth in the contract. So far as we can see, he was nothing more than a laborer or deckhand employed with the scow. When the owner of a large vessel, propelled by its own power, charters the same and agrees to provide the captain and crew of the vessel, we can understand something of the relationship of the parties, but to speak of the captain of a scow tells us nothing.

If we take it that the contract did not give the plaintiff complete possession, then the provision of paragraph two, relieving the plaintiff from responsibility for the acts of the captain, would seem to be unnecessary, because it is possession which entails responsibility.

The Federal courts in this district have held that provisions in a charter, like the provisions of paragraph two in this case, do not defeat the effect of the instrument as a demise. (*The Willie*, 231 Fed. Rep. 865; *Dailey v. Carroll*, 248 Fed. Rep. 466.) I think that is the better view, and that judgment on the pleadings should not have been directed.

I recommend that the judgments appealed from be reversed, with costs.

HISCOCK, Ch. J., COLLIN, HOGAN, McLAUGHLIN and CRANE, JJ., concur; CHASE, J., dissents.

Judgments reversed.

AMERICAN DEFENSE SOCIETY, INC., Respondent, v.
THE SHERMAN NATIONAL BANK OF NEW YORK,
Appellant.

Bills, notes and checks — payment of checks by bank after payment thereof stopped by drawer — in absence of ratification of such payment bank is liable therefor to the drawer.

Plaintiff stopped payment on checks drawn on defendant, which failed to carry out the instruction, and paid the checks. While the proof showed the checks were drawn to pay an indebtedness of plaintiff to the payee, there is no evidence to show that after the bank's mistake the depositor recognized or adopted the unauthorized payment in any way. In the absence of such ratification the bank was liable to the depositor, as it could not justify paying out the depositor's money without authority by showing that the recipient was justly entitled to it.

American Defense Society v. Sherman Nat. Bank, 176 App. Div. 250, affirmed.

(Argued January 22, 1919; decided February 25, 1919.)

APPEAL from a judgment entered February 13, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and directing judgment in favor of plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Kirkland Clark and *Rutger Bleecker Miller* for appellant. If the plaintiff is to recover on the basis of estoppel, it must establish that it has been damaged and the extent of the damage and is entitled to no recovery in excess of the actual damage; as no damage has been proved, the plaintiff is entitled to no recovery. (*Deering v. Schuyler*, 110 App. Div. 200.) The plaintiff, having given as its reason for the stoppage of payment of the checks solely the fact that the checks had been lost, as

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they apparently had been, and having subsequently notified the bank that the checks had been found, as they apparently had been, had given the bank no basis whatever for the stoppage of payment on the checks thereafter, and the bank was, therefore, justified in paying them. (*Davis v. Standard Nat. Bank*, 50 App. Div. 210; *Levine v. State Bank*, 80 Misc. Rep. 524; *Schein v. Public Bank*, 101 Misc. Rep. 499.)

Harry W. Newburger for respondent. A bank check is a mere order on the bank to pay a sum of money out of a depositor's funds, and it is subject to revocation by the drawer at any time before payment. If the bank pays after the notice of revocation it will be held to have made payment out of its own funds and not out of those of the depositor. (*Lunt v. Bank of North America*, 49 Barb. 221; *Dykers v. Leather Mfrs.' Bank*, 11 Paige, 612; *Schneider v. Irving Bank*, 1 Daly, 500; *Elder v. F. Nat. Bank*, 25 Misc. Rep. 716.)

CRANE, J. The American Defense Society, Inc., was a domestic membership corporation having an office at 303 Fifth avenue in the borough of Manhattan, city of New York.

George F. Sweeney was its executive secretary, Clarence S. Thompson was chairman of its board of trustees and George Baxter was financial secretary or employed for the purpose of raising money to carry on the work of the society.

The Sherman National Bank was a national banking corporation in the city of New York in which the plaintiff had on deposit quite a sum of money. In January of 1916 the society drew three checks upon this fund payable to the order of George Baxter. In amount they were, respectively, \$712.50, \$1,650 and \$1,200. After delivery the checks were supposed to be lost and payment at

the bank was stopped by telegram and written notice. By its answer in this action the bank admits that the plaintiff countermanded the payment of said checks and directed the defendant to stop payment thereof.

A resolution of the society required that checks upon the defendant be signed by the secretary of the board of trustees or the executive secretary of the American Defense Society and counter-signed by the chairman of the board of trustees.

Payment of the checks was stopped as above stated on January 26th, 1916. The next day one William F. Parry in behalf of George Baxter took a letter to the bank from the American Defense Society, Inc., signed by George F. Sweeney withdrawing the directions to stop payment. The lost checks had been found. This letter was not received or recognized by the bank as it failed to have the two signatures required by the above resolution. Parry told Sweeney what the bank official had said and after consultation with Thompson, chairman of the board of trustees, the letter was destroyed. The bank, however, failed to carry out the instructions which it had received and paid Baxter the checks. This action is brought by the depositor, the American Defense Society, Inc., to recover the amount of these payments. The trial court directed a verdict in favor of the defendant which has been reversed by the Appellate Division and judgment directed for the plaintiff upon new findings embodying the above facts.

It has been argued that even if the bank failed in its duty to its depositor and paid out money on the checks after payment thereof had been stopped, yet the depositor could not recover the amount of the payment upon these facts alone, but only the damage which it suffered, and the damage must be the depositor's loss. If for instance the depositor had received the benefit of the payment it would have sustained no loss. As a bank by

failing to honor a depositor's check, thus breaking its implied contract, is liable only for the damage sustained, so here, it is claimed, the plaintiff must prove actual damage.

The evidence shows that the American Defense Society was indebted to George Baxter for expenses incurred and disbursements made by him for its benefit, and that these three checks were drawn to his order in payment of the sums due. If the defendant had gone one step further and had proved that after George Baxter had cashed the checks the American Defense Society had credited itself upon its books with payment or had in any way recognized his receipt of the money from the bank as payment of its obligations to him, then in such case there would have been ratification of the wrongful act of the bank and the plaintiff could not recover. (*Fowler v. Bowery Savings Bank*, 113 N. Y. 450.)

Of course the American Defense Society could not make a profit out of the bank's mistake and could only recover that which it lost. Acknowledging the payment by the bank to Baxter as a payment of the society's debt to him would in my judgment bar recovery against the bank. The evidence, however, in this case just falls short of this necessary element to afford the bank protection. While there is proof that the checks were drawn to pay Baxter all or part of the amount due him, there is no evidence to show that after the bank's mistake the depositor recognized or adopted the unauthorized payment in any way. In the absence of ratification the bank was liable to the depositor, as it could not justify paying out the depositor's money without authority by showing that the recipient was justly entitled to it.

The judgment, therefore, appealed from must be affirmed.

COLLIN, CUDDEBACK, HOGAN and ANDREWS, JJ., concur; CHASE, J., dissents in memorandum, as follows:

CHASE, J. I dissent. The withdrawal of the direction to stop payment of the checks was signed in the same manner and with the same authority as the direction to stop such payments. The first notice was given because the checks were lost and the last as soon as the checks were found.

McLAUGHLIN, J., not sitting.

Judgment affirmed.

GEORGE A. COLVIN, Appellant, v. POST MORTGAGE AND
LAND COMPANY, Respondent.

Brokers — commissions — when real estate broker who has negotiated a sale entitled to his commissions — construction of contract providing that broker should receive his commissions on installments as paid by purchaser — extensions of time to complete contract of sale — broker's claim for commissions on unpaid installment — question whether delay was caused by seller or purchaser for jury.

1. To earn his commissions a broker must accomplish what he undertook to do in his contract of employment. Yet, even failing to do so, if he produces a buyer with whom the owner is satisfied and who contracts with the owner at a price and upon terms satisfactory to the latter, the broker is entitled to compensation. A failure to complete thereafter, whether due to the fault of the buyer or of the seller, will not deprive him of them. But by their contract the parties may vary this rule to any extent.

2. A sale of real property was negotiated by plaintiff, a real estate broker, under an agreement fixing his commissions at a certain percentage if the sale should be completed for a certain price. The buyer wishing to pay the purchase price in installments, the plaintiff and the owner, the defendant herein, before any binding contract of sale with the buyer was executed, made another agreement, reciting that the former had negotiated the sale and that the plaintiff's commissions should be a certain percentage of the purchase price "payable *pro rata* from each installment of the purchase price as and when the same is received," the final installment to be due when the final cash payment and a bond and mortgage securing the balance was turned over,

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no commission to be earned until the purchaser signed a contract of sale, and if for any cause he terminates the contract the plaintiff's right to further commissions terminates also. *Held*, that there was a consideration for such agreement.

3. After the execution of the contract of sale the buyer made a small payment on the purchase price on which the plaintiff received his commissions. No further payments have been made and the purchaser has never terminated the contract but is willing to complete it. There is a cloud upon the title on part of the property which the defendant has been unable to remove, claiming that delay was caused by the purchaser's failure to obtain and examine the search, and extensions of time within which to complete the contract have been given. Of these the plaintiff had no knowledge and never consented to them. The plaintiff brings this action for his commissions on the ground that the failure of the purchaser to carry out the contract of sale is due to the fault of the defendant. The defendant claims that the commissions are not yet due. *Held*, that the question whether delay was caused by the defendant or by the purchaser is a question of fact for the jury. *Held, further*, that if it should be determined that the delay was caused by defendant, the broker is entitled to commissions upon all installments of the purchase price due before the beginning of the action.

Colvin v. Post Mortgage & Land Co., 173 App. Div. 85, reversed.

(Argued January 8, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered June 8, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Samuel Seabury, Joseph I. Green and Chauncey E. Treadwell for appellant. The Appellate Division erred in holding that because the terms of plaintiff's contract were that he was to receive payment of his commissions out of installments as received, that this action, being brought before the actual receipt of such installments, is premature. The action is not brought to recover

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installments on the contract, but is brought to recover damages for the breach by defendant of contract, thus rendering the rule of law enunciated by the Appellate Division wholly inapplicable. (*Hix v. Edison El. Light Co.*, 10 App. Div. 75; *Smith v. Peyrot*, 201 N. Y. 210; *Gilder v. Davis*, 137 N. Y. 504; *Fuller v. Bradley Contracting Co.*, 183 App. Div. 6; *Reis Co. v. Zimmerli*, 155 App. Div. 260; *Benedict v. Pincus*, 134 App. Div. 555; *Larson v. Burroughs*, 131 App. Div. 877; *Morgan v. Calvert*, 126 App. Div. 327; *Parvin v. Abels-Gold Realty Co.*, 126 App. Div. 329; *Perry v. Bates*, 115 App. Div. 337; *Alt v. Doscher*, 102 App. Div. 344; *Sullivan v. Frazier*, 40 App. Div. 288.) The position of defendant, that the judgment must be reversed because of an inadvertent striking out of some essential part of the pleading at the trial, is unsound. (*Steinam v. Strauss*, 44 N. Y. S. R. 380; 137 N. Y. 561; *McCaddon v. Central Trust Co.*, 182 App. Div. 486; *Bohlen v. Met. El. Ry. Co.*, 121 N. Y. 546; *Pratt v. Hudson River R. R.*, 21 N. Y. 305; *Bate v. Graham*, 11 N. Y. 237; *Lounsbury v. Purdy*, 18 N. Y. 515; *Willard v. Bunting*, 34 N. Y. 153; *Haddow v. Lundy*, 59 N. Y. 320; *Rowland v. Sprauls*, 21 N. Y. Supp. 895; *Saracena v. Preisler*, 180 App. Div. 348.) The contract of sale must be construed as a valid contract for the sale of the premises for \$150,000, and the fact that it contained a condition subsequent, giving the purchaser an option to withdraw on the forfeit of the moneys already paid, does not alter its status. (*Van Name v. Queens L. & T. Co.*, 130 App. Div. 857; *Hess v. I. & T. Realty Co.*, 67 Misc. Rep. 390; *Knisely v. Leathe*, 178 S. W. Rep. 453; *Levy v. Duncan Realty Co.*, 178 S. W. Rep. 984; *Dillinger v. Ogden*, 244 Penn. St. 20; *Wright v. Suydam*, 72 Wash. 587; *Pederson v. N. Y. & E. S. Irrigation Co.*, 116 Pac. Rep. 279; *McLane v. Petty*, 159 S. W. Rep. 891; *Henderson v. Grant & Gilbert*, 171 S. W. Rep. 304; *Mattes v. Engel*, 15 S. D. 330.)

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Sol Kohn and George Murray Brooks for respondent. The brokerage contract and provisional sale contract formed the basis of plaintiff's claim to a recovery, and these contracts, read in the light of the evidence, clearly negative the right of the plaintiff to any recovery whatever. (*Seymour v. St. Luke's Hospital*, 28 App. Div. 125; *Condict v. Cowdrey*, 139 N. Y. 273; *Clark v. Hovey*, 217 Mass. 485; *Hough v. Baldwin*, 50 Misc. Rep. 546; 53 Misc. Rep. 284; *Milstein v. Doring*, 102 App. Div. 349; *Couper v. O'Neill*, 53 Misc. Rep. 319; *Lindley v. Fay*, 119 Cal. 239; *Cremer v. Miller*, 56 Minn. 52; *Owen v. Ramsey*, 23 Ind. App. 285.)

ANDREWS, J. This is an action by a broker to recover his commissions on the sale of real estate concededly brought about by him. His employment by the defendant is also conceded. The dispute is as to whether these commissions are yet due. At the close of the testimony the trial court directed a verdict in the plaintiff's favor for \$16,996. The Appellate Division has reversed the judgment subsequently entered and dismissed the complaint.

From the testimony before it the jury might have found that the defendant claimed to own some 16,500 acres of wild land in New Jersey. In 1909 it employed the plaintiff to sell this property for practically \$150,000 on a 5% commission basis. Some negotiations were had but no sale resulted. Finally in 1913, the plaintiff produced a customer whose intentions were more serious. Upon this, it was agreed that if the sale was completed for \$150,000 the plaintiff's commissions were to be increased from 5% to 10%. But the customer, one Tilney, evidently was not prepared to pay the \$150,000 in cash or upon the terms usual in cases of such sales. Therefore, the defendant might have rejected his offer and if it had done so it would be under no liability to the

plaintiff. Ordinarily, to earn his commissions a broker must accomplish what he undertook to do in his contract of employment. Yet, even failing to do so, if he produces a buyer with whom the owner is satisfied and who contracts with the owner at a price and upon terms satisfactory to the latter, the broker is entitled to compensation. (*Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Gilder v. Davis*, 137 N. Y. 504.)

The measure of this compensation under such a contract as the one before us we need not determine; the parties have reached an agreement upon it. After negotiations between the defendant and Mr. Tilney, possibly after they had substantially reached an understanding but before any binding contract was made a contract was executed between the plaintiff and the defendant. After reciting that the former had negotiated a sale to Mr. Tilney for \$150,000, it was agreed that Mr. Colvin's commissions should be 10% of the purchase price "payable *pro rata* from each installment of the purchase price as and when the same is received" by the defendant, the final installment to be due when the final cash payment and a bond and mortgage securing the balance is turned over. No commission is earned, however, until Mr. Tilney has signed a contract of sale, and if for any cause he terminates this contract, the plaintiff's right to further commissions terminates also.

In his complaint the plaintiff alleges that such contract was without consideration. This the defendant denies. It is right. Each party surrendered something. Mr. Colvin postponed the payment of his commissions and abandoned them entirely or partly in certain contingencies. The defendant surrendered the claim that the contract under which the broker was entitled to 10% had never been fulfilled and that, therefore, at most he could recover but the reasonable value of his services, and in reliance upon this agreement as plaintiff intended

it should do entered into a contract of sale which the plaintiff must have understood contemplated payments in installments, and one which, therefore, might never actually be carried out.

The next day the defendant and Tilney entered into a contract of sale. The price was \$150,000. Sixty thousand dollars was to be paid in cash installments extending from the date of the contract to January 1, 1916, when a purchase-money mortgage for \$90,000 was to be given. As installments were paid parts of the property were to be conveyed to the purchaser. An allowance was to be made for the failure of title to an unimportant portion of the tract, but if a New Jersey trust company reported a substantial failure of title the agreement was to be canceled. At any time after Mr. Tilney had paid \$4,000 he might terminate the contract, keeping the land already conveyed to him but forfeiting what he had paid, or he might assign it and thereby relieve himself from further personal liability. He was also to furnish the defendant such surveys as were necessary to carry out the contract, this clause having reference apparently to the delimitations of the plots to be conveyed to him as the installments were paid.

On the execution of this contract, Mr. Tilney paid \$1,000. Of this the plaintiff received 10%. No further payments have been made. Mr. Tilney has never terminated the contract. Indeed he seems to have been anxious to complete it, and the defendant insists it is still pending. The difficulty seems to have been that there was a cloud upon the title of a substantial part of the property, which the defendant has been seeking to remedy, so far unsuccessfully, although it claims that the delay was caused by the failure of Mr. Tilney to obtain and examine the search. There is some evidence to support this contention. Whatever the cause, extensions of time, within which to complete have been given.

Of these the plaintiff had no knowledge and he never consented to them. In fact, he testified that he was refused all information as to the contents of the contract of sale itself.

The contract we are called upon to construe is that between the plaintiff and the defendant. The contract of sale is material only so far as it is referred to therein expressly or by inference and in so far as it assists in such construction. Peculiar provisions, inserted in it without Mr. Colvin's knowledge or consent, are unimportant in view of the circumstances disclosed here.

Ordinarily when the seller has accepted the buyer brought him by his broker, when they have agreed upon terms, and executed the contract of sale, the broker's work is done and he has earned his commissions. A failure to complete thereafter, whether due to the fault of the buyer or of the seller, will not deprive him of them. (*Gilder v. Davis*, 137 N. Y. 504.) But by their contract the parties may vary this rule to any extent. The broker may if he chooses agree that if the sale falls through because of the seller's fault, he shall be entitled to nothing. Commonly, however, such is not the meaning of the parties, and an agreement should not be so construed unless such a result is clearly intended. (*Seymour v. St. Luke's Hospital*, 28 App. Div. 119; *Larson v. Burroughs*, 131 App. Div. 877.)

When the final contract between the plaintiff and the defendant was made the former must have understood that the contract for sale was to provide for payments by installments. He was content to agree not only to postpone the receipt of his compensation, but to make it dependent on their payment. Just how and when these amounts were to be paid the defendant, he says he did not know. Obviously he might well trust these matters to the seller's self interest. Again he must have known some provision was to be inserted as to possible can-

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cellation of the contract by the buyer. Once more he might trust the defendant for their interests in this matter were identical. No collections, no commissions has a fair business appeal to both seller and broker. But if the sale fails through the seller's fault, a very different situation arises. We do not find expressed or implied in this contract any indication of an intention that in such event the broker shall lose what he has earned. True he is to be paid as and when installments are received. True Tilney may not live up to his agreement. True if he terminates the contract the claim of the plaintiff ends. But all this indicates the understanding that installments are to be paid until and unless Tilney does so act or does fail to make a payment — not that they are to cease because of the fault of the defendant. This being so the complaint should not have been dismissed.

As we have said there is some slight testimony from which it might be inferred that the delay was caused not by the defendant but by Tilney. If so there can be no recovery. There is, therefore, a question of fact to be solved by a jury and we may not exercise the power conferred upon us by section 1337 of the Code of Civil Procedure.

As a new trial is to be had, and as the rule of damages adopted by the trial court was erroneous, it is well that we should indicate our views on that subject.

It was left to the defendant to fix in the contract of sale the amount and the dates of payment of various installments on the purchase price. It did so. The buyer agreed to pay such sums as fixed, unless he elected to terminate the contract. When the present action was begun no where appears. The complaint was verified July 6, 1915. Up to that time \$45,000 should have been paid. After paying \$4,000 of this sum, Tilney might have terminated the contract upon giving sixty days' notice

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of his intention so to do. There is no presumption that he would have done so. In any event he has not. So should the jury find for the plaintiff, this is the situation. Forty-five thousand dollars due under the terms of the contract. That sum unpaid through the fault of the defendant. Ten per cent commissions thereon due the plaintiff unless Tilney has canceled the contract. His failure to do so. Therefore, the claim of the defendant is this. Had it had a good title, had it tendered it to Tilney, the latter, after paying \$4,000 might have refused to go on with the transaction. Therefore 10% on \$4,000 is all that the plaintiff has certainly lost. We do not think it may so take advantage of its own wrong. Usually a purchaser intends to complete his purchase. This is enough to justify an allowance to the plaintiff of commissions on all sums due before the beginning of this action. Not commissions on \$150,000, however, as the trial judge held. The plaintiff was to receive his pay, based on 10% of each installment payable from it, "as and when the same is received" or should have been received except for the defendant's fault. Until the time arrives when a fixed sum is made payable, under circumstances such as here appear no recovery can be had.

We have examined the questions raised by the respondent as to the amendment of the complaint. The trial court correctly disregarded the alleged defect in view of the proceedings before it. If upon a new trial it appears that because of some inadvertent language of counsel necessary allegations were stricken from the complaint, a remedy may be found.

The judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, POUND and CRANE, JJ., concur; CARDOZO, J., dissents.

Judgment reversed, etc.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. RAYMOND J. CURTIS, Appellant.

Crimes — motor vehicles — violation of statute (Highway Law, ch. 30, § 290, subd. 3) requiring person who injures the person or property of another in operating an automobile to give his name and other facts to the injured person or a designated officer — evidence — *res gestae* — when declaration of injured person admissible in evidence upon trial of defendant indicted for violation of said statute.

1. The legislature has directed that an appellate court, in a criminal case, shall give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties (Code Crim. Pro. § 542), and where the jury, upon the trial of a defendant indicted for a crime, if governed by the rule of reason as laid down by the trial judge and guided by the light of human experience in determining the facts, could not have rendered a verdict other than a verdict for conviction, because the defendant's own testimony, taken in connection with the conceded and uncontradicted facts, required such result, the admission in evidence of a declaration of a person injured by the unlawful act of defendant does not affect the substantial rights of the defendant.

2. Where upon the trial of a defendant who, in violation of the Highway Law (L. 1909, ch. 30, § 290, subd. 3, as amd. by L. 1910, ch. 374) and knowing that the automobile which he was operating had collided with a wagon throwing the driver thereof to the street and injuring him seriously, had nevertheless gone on without stopping and giving his name and other facts required by the statute to the injured person or to any police, or other, officer, the judgment of conviction should not be reversed because a witness, who had heard the sound of the collision and was looking out of the window when defendant drove away, and saw the injured man crawling to the sidewalk and heard him call for help and a doctor, was permitted to state what he said. The evidence was admissible because it was a part of the *res gestae*; the declaration was spontaneous and natural and the circumstances exclude the idea of fabrication.

People v. Curtis, 184 App. Div. 924, affirmed.

(Argued January 22, 1919; decided February 25, 1919.)

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APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered May 21, 1918, which affirmed a judgment of the Jefferson County Court rendered upon a verdict convicting defendant of the crime of violating subdivision 3 of section 290 of the Highway Law.

The facts, so far as material, are stated in the opinion.

Pardon C. Williams for appellant.

Jerome B. Cooper, District Attorney, for respondent.

McLAUGHLIN, J. The defendant was convicted of violating subdivision 3 of section 290 of the Highway Law (Laws of 1909, chap. 30, as amended L. 1910. ch. 374). There have been two trials. The first resulted in a judgment of conviction, which was affirmed by the Appellate Division, but reversed by this court for errors in the admission of evidence, and a new trial ordered (217 N. Y. 304). The second also resulted in a judgment of conviction, which was unanimously affirmed by the Appellate Division, and defendant again appeals to this court.

The section of the Highway Law referred to, or so much of it as is pertinent to the question presented by the appeal, reads as follows: "Any person operating a motor vehicle who, knowing that injury has been caused to a person or property, due to the culpability of the said operator, or to accident, leaves the place of said injury or accident, without stopping and giving his name, residence, including street and street number, and operator's license number to the injured party, or to a police officer, or in case no police officer is in the vicinity of the place of said injury or accident, then reporting the same to the nearest police station, or judicial officer, shall be guilty of a felony punishable by a fine of not more than five hundred dollars or by imprisonment for a term not

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exceeding two years, or by both such fine and imprisonment * * *."

There is little dispute as to the material facts involved. On the 11th of October, 1913, the defendant, a resident of the city of Watertown, was the owner and operator of an automobile. It weighed upwards of two tons and was between fifty and sixty horse power. Between twelve and one o'clock at night on the day mentioned he, with two persons, one named Gilligan and the other Lytton, started, with the automobile, on Washington street in such city, for a ride. When they reached Chestnut street, which intersects Washington street at right angles, the automobile was running upwards of twenty miles an hour. The top was down and the lamps were lighted. There was also an arc light at the intersection of the streets mentioned. After the car had passed Chestnut street and was about one hundred and seventy feet therefrom, Lytton, who was sitting in the rear seat — the defendant and Gilligan being in the front seat — called to the defendant, saying: "Look out, boys, there is something ahead; we are going to catch it." The something to which Lytton referred was a horse and wagon going in the same direction as the automobile, and driven by one Cole. When Lytton spoke to the defendant the automobile was so close to the horse and wagon that notwithstanding the brakes were immediately applied, it nevertheless collided with the wagon, and the force of the impact was such that the automobile, wagon and horse attached thereto, were turned completely around, and when the collision was over they were facing in the opposite direction from which they were previously going. Cole was thrown from his seat to the street and very seriously injured. One thill and the reach of the wagon were broken, and the rear axle bent. The horse was injured, being cut or scratched on the left gambrel, and the automobile somewhat damaged. Immediately following the collision Lytton and Gilligan

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got out and went to Cole, who was then lying in the street two or three feet in the rear of the automobile. They asked him if he were hurt and he said he was. They took hold of him and undertook to place him on his feet, but he was unable to stand by reason of the injuries he had sustained. Gilligan then went to the defendant, who was sitting in the automobile about seven feet from where Cole was lying, and after remaining there a very short time went back to Lytton and Cole and said: "Come on, he is only winded, only busted up a bit and scared." He then returned to the car and he and the defendant called to Lytton to get into the car, Gilligan saying: "Come, get back into the car, he is only busted up a bit. There will be trouble here," and Cole responded, saying: "For God's sake don't leave me here alone." The three got into the automobile and drove away, leaving Cole lying in the street, and before the automobile had gone one hundred and seventy feet, and within ten seconds after it left Cole, the People's witness, Katherine I. Foley, who had been awakened by the sound of the collision and was standing at an open window which faced the spot where the accident occurred, saw the defendant and his two companions drive away, and she also, within that time, saw Cole crawling towards the sidewalk and heard him say, "Oh, my God, get me help; get me a doctor."

It is said because this witness was permitted to testify to this declaration of Cole's that the judgment must be again reversed and a new trial ordered. I am unable to agree to this result. I think this evidence was admissible because it was a part of the *res gestæ*. The admission in evidence of the declarations of an injured person constitutes an exception to the general rule that excludes hearsay evidence, and is justified when the declarations are so spontaneous or natural as to exclude the idea of fabrication. (*People v. Sprague*, 217 N. Y. 373; *Greener v. General Electric Co.*, 209 N. Y. 135.)

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This declaration was spontaneous. It was made within ten seconds after defendant left Cole. It was natural that one injured as severely as Cole was, when he learned that he had been left alone lying in the street at that hour of the night, should call for help and medical care. All of the circumstances exclude the idea of fabrication.

But assuming that the testimony of the witness Foley as to the declaration of Cole was erroneously admitted, it did not harm the defendant. He knew there had been an accident; that his automobile had collided with a wagon with sufficient force to turn both vehicles completely around, and to throw a person on the wagon to the street; and that such person was injured. If he did not see Cole lying in the street when he drove away, it was because he did not look; if he did not hear Cole tell Gilligan and Lytton that he was injured so he could not stand, it was because he did not listen. He could not evade the provision of the statute quoted by neglecting to do either. There was an obligation imposed upon him, as the operator of the automobile — no matter what Gilligan told him or whether he heard Lytton say “the man is pretty badly hurt” — to ascertain for himself, before he drove away, whether Cole was injured or his property damaged. Had he discharged that obligation he would, before leaving the scene of the accident, have given to Cole his name, residence, street number, and the number of his license. It is quite apparent, when all of the evidence is considered, that his one thought was to get away as quickly as possible. The evidence is that he left the place of the accident within two or three minutes after it occurred, indicating as clearly as anything can, that instead of trying to obey the statute, he intended to evade it by concealing his identity. Nor did he disclose it until he was called upon by a police officer the following afternoon.

The legislature has directed that an appellate court, in

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a criminal case, shall give judgment without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the parties. (Code of Criminal Procedure, sec. 542.) We frequently, even in capital cases, obey this direction. (*People v. Sprague, supra*; *People v. Ferola*, 215 N. Y. 285; *People v. Kane*, 213 N. Y. 260; *People v. Sarzano*, 212 N. Y. 231.) The exception to the admission of the declaration referred to did not affect the substantial rights of the defendant. The jury, if governed by the rule of reason in applying the law as laid down by the trial judge, and guided by the light of human experience in determining the facts, could not have rendered a verdict other than the one which it did. The defendant's own testimony, taken in connection with the conceded and uncontradicted facts, required such result.

The other alleged errors have been carefully examined but do not seem to be of sufficient importance to be here considered.

The defendant had a fair trial, was justly convicted and the judgment should be affirmed.

CHASE, CUDDEBACK, CRANE and ANDREWS, JJ., concur;
COLLIN and HOGAN, JJ., dissent.

Judgment affirmed.

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Statement of case.

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JOSEPH J. JERMYN, Respondent, *v.* FREDERICK F. SEARING et al., Copartners under the Firm Name of SEARING & COMPANY, Defendants, and THE EMPIRE TRUST COMPANY, Appellant.

Stock subscriptions — construction of agreement proposed to be entered into by a syndicate composed of subscribers of bonds to be issued to build a proposed railroad and the railroad promoters as managers of the proposed syndicate — when such agreement signed by only one subscriber for bonds does not authorize promoters to borrow money on strength of such subscription — when subscriber who is not liable for such loan may have agreement and subscription canceled.

1. In the absence of estoppel the party who has given an authority in writing is right in asking that that authority be followed as it is stated, and not as the other parties thought he would be willing they should use it. Nothing can be added to or read into the agreement unless there be an ambiguity which gives play for judicial interpretation.

2. Agreements to subscribe for the stock of a corporation to be formed presuppose the organization of the corporation before they become binding and enforceable. In the absence of express authority to borrow upon an individual subscription to buy bonds, the agreement to subscribe assumes the incorporation of the binding company and that it will not be enforceable until that time.

3. In order to carry out a scheme to construct a proposed railway and acquire the stock and bonds of two railroads, one built and one projected, to be amalgamated into one system with the proposed railway, an agreement was proposed to be entered into by a syndicate composed of the subscribers for the bonds to be issued in order to finance the scheme and a firm of promoters as managers of the syndicate. The syndicate was to apply the proceeds of such bonds to the construction of the proposed railway and do all things its managers deemed fit to accomplish that purpose, including the right to arrange for advances to be made from time to time upon the security of the agreement for building the railroad. The plaintiff herein alone signed such agreement as a subscriber to a designated number of bonds, a small part of the number proposed to be issued. Upon these facts, it cannot be held that loans were to be

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procured upon the strength of such agreement before the contemplated railway was incorporated or bonds issued or authorized to be issued.

4. Where the managers of the proposed syndicate, without the knowledge of plaintiff, procured a loan upon their note as managers secured by the subscription agreement signed by plaintiff, part of which loan was used to repay another loan made by said trust company to said promoters over a month before the plaintiff signed the agreement, the plaintiff is not obligated under such subscription to reimburse the trust company for the loan to the promoters, who are insolvent, but is entitled to have the agreement canceled.

Jermyn v. Searing, 170 App. Div. 707, affirmed.

(Argued January 29, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 10, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The action was to obtain the revocation of a subscription to a syndicate agreement upon the grounds that plaintiff's subscription was obtained by fraud, without consideration; that it had been revoked; that no syndicate was ever formed and that there were no other subscribers. The answer set up a counterclaim for money alleged to have been loaned upon the strength of said subscription.

The facts, so far as material, are stated in the opinion.

William D. Guthrie and *Thomas F. Gilroy, Jr.*, for appellant. *Searing & Co.* had authority as syndicate managers to borrow money for construction purposes or the acquisition of securities. (*Minot v. Burroughs*, 223 Mass. 595; *Keyes v. Met. Trust Co.*, 220 N. Y. 237; *Le Roy v. Beard*, 8 How., U. S., 451; *Very v. Levy*, 13 How. Pr. 345, 358; *Jackson v. Builders Wood Working Co.*, 91 Hun, 435; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *N. Y. & New Haven R. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Batavia v. N. Y., L. E. & W. R. R. Co.*, 106 N. Y. 195; *Provident Trust Co. v. Mercer County*,

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170 U. S. 593; *Waite v. Santa Cruz*, 184 U. S. 302; *Gunnison County Commissioners v. Rollins*, 173 U. S. 255; *Pendleton County v. Amy*, 13 Wall. 297.) The revocation of an agent's authority is not effective as against innocent third parties unless brought to their attention. (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *F. L. & T. Co. v. Wilson*, 139 N. Y. 284; *McNeilly v. Cont. Life Ins. Co.*, 66 N. Y. 23; *Clafin v. Lenheim*, 66 N. Y. 301; *Glennan v. Rochester Trust & S. D. Co.*, 209 N. Y. 12; *Hatch v. Coddington*, 95 U. S. 48; *Johnson v. Christian*, 128 U. S. 374; *Wood v. Duff-Gordon*, 222 N. Y. 88; *Horton v. Erie Preserving Co.*, 90 App. Div. 255; 181 N. Y. 535; *Hutchins v. Smith*, 46 Barb. 236; *Hess v. Rau*, 95 N. Y. 359; *Farrell v. Amberg*, 8 Misc. Rep. 220; 151 N. Y. 670.) The subscription agreement was a binding and certain contract between the plaintiff and Searing & Co., and was supported by sufficient consideration in the express and implied promises of and obligations and duties assumed by Searing & Co. (*Wood v. Duff-Gordon*, 222 N. Y. 88; *Godine v. Kidd*, 64 Hun, 585; *Callin v. Green*, 120 N. Y. 441; *Singer Co. v. Union Co.*, Holmes, 253; *Philadelphia Ball Club, Ltd., v. Lajoie*, 202 Penn. St. 210; *Industrial & General Trust, Ltd., v. Tod*, 180 N. Y. 215; *Moran v. Standard Oil Co.*, 211 N. Y. 187; *Folliard v. Wallace*, 2 Johns. 395; *Horton v. Erie Preserving Co.*, 90 App. Div. 255; 181 N. Y. 535; *Hutchins v. Smith*, 46 Barb. 235; *Levy v. West Side Const. Co.*, 162 N. Y. Supp. 661.) The agreement to pay the "managers" the amount set opposite their respective names, set forth in the second clause, is assumed by the subscribers, *i. e.*, by each subscriber severally for himself and to the extent only of the amount of his individual subscription. The express authority to arrange for advances is upon the security of this agreement, and not upon the security of the whole syndicate. (*Sandford v. Halsey*, 2 Den. 235; 25 Wend. 475; *Ada*

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Dairy Assn. v. Mears, 123 Mich. 470; *Wood v. Duff-Gordon*, 222 N. Y. 88; *Railroad v. Kinsman*, 77 Maine, 370; *Phœnix Warehousing Co. v. Badger*, 67 N. Y. 294; *Hastings Lumber Co. v. Edwards*, 188 Mass. 587; *Yonkers Gazette Co. v. Taylor*, 30 App. Div. 334; *Knickerbocker Trust Co. v. Davis*, 143 Fed. Rep. 587; *C. & C. R. R. Co. v. Garland*, 14 S. C. 63; *Gibbons v. Ellis*, 83 Wis. 434.)

Reid L. Carr for respondent. The syndicate agreement gave no power to Searing & Co., as syndicate managers or as agents for plaintiff, to borrow money on his account or for the repayment of which he would be liable. (*Delafield v. State*, 26 Wend. 191; *Shaw v. Saranac Horse Nail Co.*, 144 N. Y. 220; *Craighead v. Peterson*, 72 N. Y. 279; *Smith v. Tracy*, 36 N. Y. 79; *Lawrence v. Gebhard*, 41 Barb. 575; *Guardian Trust Co. v. Peabody*, 122 App. Div. 648; 195 N. Y. 544; *Porges v. United States Mortgage & Trust Co.*, 203 N. Y. 181; 1 Clark & Skyles on Agency, 267; 31 Cyc. of Pl. & Pr. 1395; *Bray v. Farwell*, 81 N. Y. 600.) No effort was made and no intention formed by any of the defendants to lend or borrow money for Jermyn's account and no promise was given or pretended to be given on his behalf to repay the loan of April second. No privity of contract was created or attempted to be created between Jermyn and the trust company. There was a complete failure of proof as to the counterclaim. (*Paige v. Willett*, 38 N. Y. 28; *Ferriss v. Hard*, 135 N. Y. 354; *Bradt v. McClenahan*, 118 App. Div. 768; *Guaranty Trust Co. v. Dinwiddie*, 79 Ore. 653; *Atty.-Gen. v. Drummond*, 1 Dr. & War. 368; *Sturm v. Boker*, 150 U. S. 312, 336; *Insurance Co. v. Dutcher*, 95 U. S. 269; *Nicoll v. Sands*, 131 N. Y. 19; *Seymour v. Warren*, 179 N. Y. 1, 6; *Rowland v. Hall*, 121 App. Div. 459.) The syndicate agreement pledged with the Empire Trust Company as collateral security was subject to all equities and defenses available against Searing &

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Co., and the trust company as pledgee acquired no greater right to enforce it than Searing & Co. possessed. (*Rapps v. Gottlieb*, 142 N. Y. 164; *Stevenson Brewing Co. v. Iba*, 155 N. Y. 224; *Central Trust Co. v. W. I. Imp. Co.*, 169 N. Y. 314; *Selwyn v. Waller*, 212 N. Y. 513; *Guaranty Trust Co. v. Dinwiddie*, 79 Ore. 653; *Wing v. McCallum*, 244 Fed. Rep. 199.) Plaintiff was not bound by the syndicate agreement because his subscription was for twenty out of a total of six hundred syndicate shares and no other person ever subscribed for a single share. (*Bray v. Farwell*, 81 N. Y. 600; *Pitchford v. Davis*, 5 M. & W. 2; *Cabot & West Springfield Bridge v. Chapin*, 6 Cush. 50; *Stoneham Branch R. Co. v. Gould*, 68 Mass. 277; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; 1 Cook on Corp. [6th ed.] § 176; 2 Clark & Marshall on Corp. § 505.) Jermyrn was never bound by the agreement because it was void for want of consideration and want of mutuality. (1 Page on Cont. 452; *Green v. Sigua Iron Co.*, 88 Fed. Rep. 203; 88 Fed. Rep. 207; 104 Fed. Rep. 854; *Lerner v. Tetrizzini*, 71 Misc. Rep. 182; 144 App. Div. 928; 207 N. Y. 709; *Chicago R. Co. v. Dane*, 43 N. Y. 240; *Commercial Co. v. Northampton P. C. Co.*, 115 App. Div. 388; 190 N. Y. 1; *Howie v. Kasnowitz*, 83 App. Div. 295; *Thayer v. Burchard*, 99 Mass. 508; *Goodyear v. Koehler*, 159 App. Div. 116; *Barrow v. Mexican R. Co.*, 134 N. Y. 15; *Rehm-Zeithor Co. v. Walker*, 160 S. W. Rep. 777; *Arnot v. Pittston Coal Co.*, 68 N. Y. 565.)

CRANE, J. Joseph J. Jermyrn at all the times herein mentioned was a wealthy mine owner, resident in Scranton, Pennsylvania. Searing & Co. was a copartnership carrying on a banking and promoting business with offices at 7 Wall street, New York city.

The Empire Trust Company was a banking corporation of New York city which acted as trustee under mortgages

to secure the bonds issued or to be issued by the four railroads hereinafter mentioned.

The Delaware and Eastern Railroad Company was organized and incorporated in November, 1904, under the laws of the state of New York with an authorized capital of \$600,000, to own and operate about forty-eight miles of railroad extending from the village of East Branch to the village of Arkville with a spur from Shavertown to Andes, all in the county of Delaware, New York state. Construction was commenced in September of 1905 and continued to completion in September of 1907. \$1,000,000 par value first mortgage bonds were issued by this railroad company, \$600,000 of which were placed by Searing & Co. upon the market.

The Empire Trust Company was the trustee under the mortgage to secure these bonds executed on or about January 1st, 1906.

The Hancock and East Branch Railroad was organized on July 11th, 1906, with a capital stock of \$200,000, for the purpose of building a railroad from Hancock to East Branch, a distance of about seven miles. On or about January 2d, 1907, it executed a mortgage to the Empire Trust Company to secure an issue of its bonds with the par value of \$1,000,000. The mortgage was never recorded and no bonds were ever issued.

The Schenectady and Margaretville Railroad Company was organized on July 26th, 1906, with a capital stock of \$1,000,000, for the purpose of building and operating a railroad from the village of Arkville to the city of Schenectady. Arkville was one of the termini of the Delaware and Eastern Railroad Company. On the 2d day of January, 1907, it executed a mortgage to the Empire Trust Company to secure an issue of its bonds at the par value of \$4,500,000. The mortgage was never recorded and the bonds were never issued.

It will thus be seen that with the construction of these

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two latter railroads there would be a continuous line from Schenectady to Hancock on the Pennsylvania border in the state of New York.

Searing & Co., the promoters, began to survey and lay grades in or about June of 1906 for these two railroads, or, as it might be termed, the extension under separate corporate entities of the Delaware and Eastern Railroad from Arkville on the east and East Branch on the west.

The Delaware and Eastern *Railway* Company was incorporated about May 13th, 1907, with a capital stock of \$1,200,000, for the purpose of consolidating the three railroads above mentioned so as to give it the full control and management of the system between Schenectady and Hancock.

On July 1st, 1907, this *railway* company executed and delivered a mortgage to the Empire Trust Company as trustee to secure the issue of bonds to the amount of \$6,500,000, which were to be used for the purpose of retiring the outstanding bonds and stock of the Delaware and Eastern Railroad Company, the bonds of the Schenectady and Margaretville Railroad Company and for the other general purposes of the railway company.

This litigation grows out of a loan of \$150,000 which the Empire Trust Company made to Searing & Co. as managers of a syndicate on a subscription agreement for \$200,000 of these bonds of the Delaware and Eastern *Railway* Company signed by the plaintiff, Jermyn. The question is, who is to lose this money, the subscriber or the banking institution which loaned on his subscription.

Searing & Co. became bankrupt on February 24th, 1910, and the Delaware and Eastern Railway Company went into the hands of a receiver two days later.

In my judgment the result of this case depends upon the interpretation of Jermyn's subscription agreement, and to understand the question presented it is necessary to state some additional facts.

In June of 1905 Jermyn, through the solicitation of Searing & Co., purchased \$100,000 par value of the bonds of the Delaware and Eastern Railroad Company (not Railway), paying cash therefor. He received at the time two hundred and fifty shares of the stock as a bonus. On August 15th of 1906 the plaintiff agreed to buy an additional \$100,000 of these bonds, but instead of paying cash therefor, authorized Searing & Co. to obtain a loan of \$95,000 with which to pay the purchase price, \$85,000 from the Empire Trust Company and \$10,000 from the Newton Trust Company of Newton, New Jersey. Searing & Co. were to sell these bonds and out of the proceeds pay the loans and keep the profits. As security for this loan of \$85,000 from the Empire Trust Company, Jermyn gave his demand note which was called for payment on the 21st day of March, 1907. When the plaintiff on the 26th day of March, 1907, called at the trust company in reference to this demand he told its president of the arrangement he had made with Searing & Co. whereby they were to sell the bonds and out of the proceeds pay the note. He recognized, however, his obligation and paid \$30,000 on April 1st, 1907, \$40,000 July 15th, 1907, and the balance, \$15,000, on August 20th, 1907, at which time the president wrote him a letter of thanks stating that the bonds taken as security would be shipped according to instructions.

Thus the plaintiff by August of 1907 had paid in cash for \$200,000 of the bonds of the Delaware and Eastern Railroad Company. His first subscription was made by signing an agreement in writing somewhat similar to that hereinafter mentioned and which forms the dispute in this case.

This litigation is over the second agreement signed March 12th, 1907, by the plaintiff when he subscribed for bonds amounting to \$200,000 of the Delaware and Eastern Railway Company. On April 2d, 1907, Searing

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& Co. obtained from the Empire Trust Company a loan of \$150,000 upon the strength of this subscription paper using it as collateral for the loan. The plaintiff knew nothing about this transaction until March of 1908, when demand was made upon him for payment which he refused. The facts so far as material regarding this loan may be briefly stated.

When on March 26th Mr. Jermyn was in New York consulting the Empire Trust Company about his \$85,000 loan which had been called, one of the firm of Searing & Co. was in Scranton, Pennsylvania, seeking to borrow of the Dime Deposit and Discount Bank of that place \$50,000 on this second subscription agreement. Learning of this fact upon his return home on the 27th, Jermyn immediately repudiated any right of Searing & Co. to borrow on this paper and wrote them a letter on the 28th canceling his subscription. On the 30th of the month Searing & Co. wrote a letter to Mr. Baldwin, president of the Empire Trust Company, in which they stated this proposition:

"For you to make us a loan of one hundred and fifty thousand dollars (\$150,000) for three months with the privilege of renewing it for another three months, on our note to be secured by an underwriting agreement with Mr. J. J. Jermyn for two hundred thousand dollars (\$200,000) par value of bonds of the Delaware and Eastern Railway Company Syndicate."

On April 2d the Empire Trust Company made the loan by paying to Searing & Co. as managers of the Delaware and Eastern Railway syndicate the sum of \$150,000, taking as security their note as such managers, the subscription agreement signed by Jermyn and a few days later four calls upon Jermyn for payment of his subscription to be used only in case Searing & Co. failed to meet their note. The note thus given was for three months and was renewed from time to time until pay-

ment was demanded February 27th, 1908. Fifty thousand dollars (\$50,000) of the amount loaned was immediately returned to the Empire Trust Company to take up a previous note of Searing & Co. given together with securities of the Delaware and Eastern Railroad Company for a loan obtained February 5th, 1907, over a month before the plaintiff became a subscriber to the bonds of the *railway* company.

Having these facts before us the point presented may be stated briefly as follows: The plaintiff signed a subscription agreement under which Searing & Co. claimed to have the right to borrow money of the Empire Trust Company. Did the paper contain such authority? The trial court has found that the subscription agreement was without consideration or mutuality, was void for fraud and also subject to a collateral agreement made between the plaintiff and Searing & Co. that the subscription should not be binding unless or until all the shares of the proposed syndicate or all the \$6,000,000 bonds should be subscribed for. We take it, however, that none of these facts would be a good defense as against the Empire Trust Company acting in good faith without knowledge, if the subscription agreement authorized Searing & Co. to borrow and the Empire Trust Company to loan under the conditions and circumstances stated. The court found, and was justified in so finding, that the trust company acted in all these matters in absolute good faith. We must, therefore, examine this syndicate agreement to find the authority if it exists.

March 12th, 1907, is the date of the contract headed, "Delaware and Eastern Railway Co." — "Syndicate Agreement." The parties of the first part are Searing & Co. and the parties of the second part are the "subscribers hereto" called the "subscribers" and collectively the "syndicate." The recitals contain a statement that the parties of the first part have "acquired the rights

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to the control of six million dollars (\$6,000,000) 5% bonds of a company about to be formed to be known as the Delaware and Eastern Railway Co. or by some other name," and that the parties desire to form a "syndicate" to purchase the said six million dollars of bonds of said company. Then follows the agreement said to be made between the parties of the first part "who are to be the managers of the syndicate and the syndicate." It will be noticed that the agreement is not between Searing & Co. and a "subscriber" individually, but between said firm, as managers and the "syndicate" the "subscribers," the party of the second part. The purpose is to buy six million dollars of bonds of a company *about* to be formed. After specifying the number of shares of the company, the number the respective subscribers agree to take, a copy of the negotiable receipt to be given upon payment of the subscriptions, the right of the managers to reject or reduce any subscription there follows paragraph "seventh" in these words:

"It is understood that the bonds of the present underwriting are for the purpose of constructing a line from Hancock, N. Y., to Schenectady, N. Y., by acquiring all the stock and all the bonds of the Hancock and East Branch Railroad Company and the Schenectady and Margaretville Railroad Company authorized by the Board of Railroad Commissioners and all the rights, privileges and franchises now granted to these companies, and also to acquire, by lease or otherwise, the present Delaware and Eastern Railroad Company, already constructed and operated, amalgamating the three railroads into one system, to be known as the Delaware and Eastern Railway Company, or by some other appropriate name.

"And, the 'Subscribers' hereto do hereby consent and the 'Managers' are hereby empowered to do any and all acts, to purchase any other securities, and to

apply the proceeds of the within underwriting in any manner which, in their judgment, they may deem fit in order to accomplish the above purpose, including the right to arrange for advances to be made from time to time to the Contractors or Construction Company that may hereafter be formed to build the said Railroad, by one or more Banks or Trust Companies, upon the security of this agreement, if necessary, together with the bonds and certificates subscribed for hereunder or that may be purchased by the 'Managers' with the proceeds of the within underwriting."

Who gives to the managers the power to purchase and arrange with trust companies for advances? The "subscribers" the "party of the second part" also called "the syndicate." I find nothing in this agreement constituting one subscriber a "syndicate" or the "party of the second part." No authority is here conferred by an individual subscriber to borrow money on his name; it is the syndicate which empowers advances to be arranged for "upon the security of this agreement." The agreement mentioned is that to which Searing & Co. are one party and the syndicate or subscribers the other party. The fact that subscriptions may have been taken on separate sheets of paper cannot alter the legal effect. The contract consists of all such papers taken together. It is quite evident that there was to be no agreement, no power to bind the individual until the party of the second part came into being and the syndicate was formed. If the contrary was the intention it could have been so stated as in *Knickerbocker Trust Co. v. Evans* (188 Fed. Rep. 549); *Knickerbocker Trust Co. v. Davis* (143 Fed. Rep. 587).

When this paper was presented to the Empire Trust Company to obtain a loan of \$150,000 what was to be seen and read? In the first place it bore simply the plaintiff's signature for \$200,000 of the bonds. No one

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else had signed it and no statement was made that any other subscriptions had been procured. So far as the trust company knew this was the only subscription. It stated that the bonds subscribed for were for the purpose of constructing a line from Hancock to Schenectady in the following manner:

By acquiring the stocks, bonds and franchises of the Hancock and Eastern Branch Railroad Company and the Schenectady and Margaretville Railroad Company and to acquire by lease or otherwise the existing Delaware and Eastern Railroad Company. It stated without reservation, although such was not the fact, that this latter railroad was "already constructed and operating." The amalgamation was to be known as the Delaware and Eastern Railway Company. Then the subscribers gave to the managers certain powers and they were these:

1st. To purchase *any other* securities (this did not mean the securities above mentioned). 2nd, to apply the proceeds of the within underwriting in any manner they deemed fit.

Next came the authorization to borrow money, the right to arrange for advances from time to time from banks and trust companies. This was limited as follows:

(a) The advances were to be to contractors. This could hardly have meant Searing & Co. as they had been referred to throughout the agreement as "managers." Something other must have been meant than the managers, or this word would have been repeated. The "contractor" meant the person contracting to build the extensions to the road.

(b) The advances were to build the new railway. This did not mean to build the Delaware and Eastern Railroad, for it was stated in the preceding paragraph that such road was "already constructed and operating." This had reference to the two additional lines above

referred to which were to connect at either end with the Delaware and Eastern Railroad, as built or as being constructed. While this road had not actually been finished, yet as the agreement stated that it was, this indicated at least an intention that the money of the new syndicate, or at least that which was to be borrowed, was not to be used to complete it.

(c) The advances were to be made "upon the security of this agreement, if necessary, together with the bonds and certificates subscribed for hereunder." It could hardly be supposed that loans were to be procured upon the strength of a subscription agreement before any railroad such as contemplated was incorporated or bonds issued or authorized to be issued. It says that if necessary the subscriptions may be used to obtain money *together* with the bonds. While this might not require the bonds to accompany the agreement, yet in the most liberal interpretation it was expected that the corporation should be formed and the bond issue authorized.

Agreements to subscribe for the stock of a corporation to be formed presuppose the organization of the corporation before they become binding and enforceable. It may not be that the subscriptions must be full and complete before the contract of a subscriber can be enforced, but the corporation when formed is generally the party to enforce the agreement. (*Marysville Electric Light & Power Co. v. Johnson*, 93 Cal. 538; *Ashuelot Boot & Shoe Co. v. Hoyt*, 56 N. H. 548; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *International Fair & Exposition Assoc. of Detroit v. Walker*, 83 Mich. 386.)

In the absence of express authority to borrow upon the individual subscription to buy bonds, the agreement to subscribe assumes the incorporation of the bonding company and that it will not be enforceable until that time.

What was said in *Dorris v. Sweeney* (60 N. Y. 463, 467) about a stock subscription is not inappropriate here. The

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defendant in that case signed an instrument whereby he and others agreed to form a company for the purpose of purchasing a patent for preserving fruits and vending the same and to pay for the amount of stock set opposite their respective names. Five thousand dollars was subscribed by the defendant. The company when formed also included the purpose of manufacturing preserved fruits and of canning fruits. This court said: "A legal and effectual formation of a corporation or joint stock company for the purpose specified in the contract was a condition precedent to his obligation to put in his capital. He would not be bound under such a contract to invest his capital in the stock of a corporation not legally formed, or which had not obtained the franchise of carrying on the business contemplated by the contract, and in which he had agreed to become interested." (See, also, *Buffalo & Jamestown R. R. Co. v. Gifford*, 87 N. Y. 294; *Buffalo & Allegany R. R. Co. v. Cary*, 26 N. Y. 75.)

The loan made, in this case, was to Searing & Co. and not to any contractor. It was not for the purpose of building the extensions, above referred to. The trust company knew that \$50,000 of it was to repay a previous loan obtained a month before the subscription agreement was signed. The Delaware and Eastern Railway Company was not at the time incorporated for it did not come into existence until May 13th, 1907, and no bonds were issued or authorized to be issued until after July 1st, 1907. Searing's letter to President Baldwin, March 30th, 1907, stated:

"We now have our lines out arranging the underwriting for this new proposition and have already made a very substantial start. We will not begin any construction work until we have the funds in hand to complete the Hancock and East Branch division."

Therefore, we must conclude that this contract did not authorize Searing & Co. to obtain money from the

Empire Trust Company for and on behalf of Jermyrn at the time and under the conditions stated, and that a plain reading of the paper in the light of the known facts so indicated to the trust company.

We have not overlooked the force of the sweep of the appellant's argument that this was one railroad enterprise undertaken to connect Schenectady with Hancock, and that all the moneys raised at any time were devoted or to be applied to the one cause irrespective of the three or four separate corporations. This may be the natural way in which the business man would look at it. Viewed in optimism and hope no doubt many great undertakings would not be finished if the organizers stopped at every step to examine too closely the obstacles. Success often overlooks faults and the law is not always quick enough for some necessary action. Failure, however, is critical and scans the letter as well as the spirit of an agreement.

So here, it may very well be that the parties understood this to be the building of a single railroad and that the four corporations were but a means to one end, that the two separate syndicates which had been formed were in essence but one and that a loan obtained at any time and used for the common purpose was justifiable. Yet when the scheme failed the parties naturally turned to the writings as a chart of powers and liabilities. In the absence of estoppel the party who has given an authority in writing is right in asking that that authority be followed as it is stated and not as the other parties thought he would be willing they should use it. As above indicated there was no authority given Searing to borrow the money as was done and the loss must fall upon the trust company.

Appellant's counsel in his brief states that in order for his client to win, the agreement must be read in the light of the purposes and objects to be accomplished, and that "the terms used are in some respects artificial

and inapt." Of course nothing can be added to or read into the agreement unless there be ambiguity which gives play for judicial interpretation. We find no such ambiguity.

If we pass this question of authority to obtain advances and consider the agreement as an assignment or collateral security for the loan to Searing & Co., then we would be inclined to some of the views expressed by the counsel for the trust company. Thus, we do not believe that the findings show any fraudulent misrepresentations regarding the right to control the \$6,000,000 bond issue. It was evident on the face of the papers that the syndicate was in the process of formation, that Searing & Co. were the promoters and organizers and were to create the corporation and procure the bonds. The right to control spoken of was not the expression of a past fact upon which to base fraud, but rather the expression of anticipated results due to the promoters' activities. They were to get subscribers and sell the bonds. It is evident that there could be no false representations upon which Jermyn relied under these circumstances.

Neither do we think there was such lack of mutuality or consideration upon the face of the paper as to make the agreement void. We would, however, be bound by the unanimous finding that there was a collateral agreement between Jermyn and Searing that the subscription would not be binding until the full amount had been subscribed, and as this would be a good defense against Searing & Co. it also would be sufficient as against third parties. The collateral was non-negotiable, open to all the equities in the hands of innocent purchasers, existing between the original parties.

However, we need not pass upon this branch of the case as the appellant concedes that its right to recover, if at all, is based upon the authority in the syndicate agreement to borrow money upon the credit of Jermyn. It asserts its rights as one who made a loan to the syndi-

cate upon the faith of an authority conveyed in the underwriting agreement upon Searing & Co. as syndicate managers. We find, as already stated, no such authority as used at the time and under the circumstances presented.

Some rulings of the trial court have been called to our attention and we also are in accord with much that the counsel for the appellant has stated about them.

No doubt it is somewhat annoying to have the trial court express a decided view that the written paper gave Searing & Co. the authority to borrow money of the Empire Trust Company and then subsequently change about and decide the other way, but this is one of the irritations of litigation and the frailties of the human mind.

Then, too, much evidence was received as against Searing & Co. not competent as against the Empire Trust Company but which it is stated was subsequently used as against the latter in forming the decision. Even if this should be true no question is presented which we can pass upon in view of the unanimous affirmance. The evidence was competent against one defendant and could not be excluded. If we are bound by findings, although there be no evidence to sustain them, we would likewise be bound where the findings are based upon evidence received as against one party only, but used for conclusions against the other. This would be a matter for the Appellate Division in reviewing the evidence and not for this court.

Evidence might well have been received showing all that Searing & Co. had done in building the railroad, the amount of money expended and the other subscribers obtained or solicited, but we are convinced that the exclusion of this evidence was harmless in view of our opinion on the main question of authority. Some of the findings are inconsistent, but taking those most favorable to the appellant we have arrived at the conclusion already stated.

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We have not failed to note the jealous earnestness of counsel for the honor of his client as well as its financial benefit, but surely this is satisfied by the findings in all the courts to which we give our final approval that it acted in all these matters with the utmost good faith. The judgment should be affirmed, with costs.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO and POUND, JJ., concur; ANDREWS, J., concurs in result.

Judgment affirmed.

JOSEPH L. BERS et al., Doing Business under the Firm Name of E. BERS & Co., Appellants, v. ERIE RAILROAD COMPANY, Respondent.

Carriers — bill of lading — ejusdem generis — provision that goods received from private or other sidings shall be at owner's risk until "cars are attached to and after they are detached from trains" — construction and meaning of term "private or other sidings."

1. Where it is provided by a bill of lading that property "received from or delivered on private or other sidings, wharves, or landing shall be at owner's risk until the cars are attached to and after they are detached from trains," the purpose of such provision is to limit the liability of the carrier by fixing definitely a time when owner's risk terminates and carrier's risk begins. The words "or other" following the word "private" are restricted to the same kind of sidings and include not all sidings but only sidings like private sidings.

2. Where merchandise was loaded by plaintiffs under such a bill of lading into a car standing on a side track in front of their warehouse, which track had been constructed by the defendant railroad company on its own land in front of a number of warehouses, including that of the plaintiffs, for the reception of goods from, and delivery to, such warehouses, and before the car, upon which the merchandise was loaded, had been attached to a train the merchandise was taken therefrom, the plaintiffs cannot, under the terms of the bill of lading above quoted, recover from the defendant the value of such merchandise.

Bers v. Erie R. R. Co., 176 App. Div. 241, affirmed.

(Argued January 31, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 31, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph Kahn and Frederick Zorn for appellants. The Appellate Division erred in holding that private or other sidings comprehend all sidings. (*Duanesburgh v. Jenkins*, 40 Barb. 584; *Matter of Hermance*, 71 N. Y. 481; *Allam v. Penn. R. R. Co.*, 183 Penn. St. 174; *Bainbridge Grocery Co. v. Atlantic Coast Line*, 8 Ga. App. 677; *Nat. Refining Co. v. St. L., I. M. & S. Ry. Co.*, 237 Fed. Rep. 347; *Swift Co. v. H. V. R. R. Co.*, 243 U. S. 281; *Union Lime Co. v. Boston Ry. Co.*, 233 U. S. 211; 10 Corpus Juris, 182; *Hawkins v. Gt. Western Railway*, 17 Mich. 57; *Zimmer v. N. Y. Central Co.*, 16 N. Y. Supp. 631; 137 N. Y. 460.) The track upon which the car was loaded was neither a "private" nor "other siding" within the meaning of the bill of lading. (*Associated Jobbers v. A., T. & S. F. Ry. Co.*, 18 I. C. C. 310; *N. Y. C. R. R. Co. v. Gen. El. Co.*, 219 N. Y. 227; *Swift v. H. V. Ry. Co.*, 243 U. S. 281; *Jolly v. A., T. & S. F. Ry. Co.*, 21 Cal. App. 368.) The track in question was a part of defendant's terminal and freight yard to which the siding clause does not apply. (*People ex rel. City of Buffalo v. N. Y. C. R. R. Co.*, 156 N. Y. 570; *B. & O. S. W. R. Co. v. Little*, 149 Ind. 167; *Morisetto v. C. P. R. R. Co.*, 56 Atl. Rep. 1102; *Associated Jobbers v. A., T. & S. F. Ry. Co.*, 18 I. C. C. 310.)

Harold W. Bissell and William C. Cannon for respondent. The Appellate Division was correct in construing the words "private or other sidings" as including all sidings; in holding that the track upon which the car

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was loaded was a siding; and that respondent was, therefore, not liable for the loss. (Sutherland on Stat. Const. [2d ed.] § 437; *Nat. Bank v. Ripley*, 161 Mo. 126; *Standard C. T. Co. v. P. R. R. Co.*, 88 N. J. L. 257; *O'Brien v. U. C. L. Ins. Co.*, 207 N. Y. 180.) Upon the undisputed evidence the siding in question is within the meaning of "private or other sidings," even if the Appellate Division's construction thereof be deemed too broad, and the meaning be restricted to private or other sidings *ejusdem generis*. (*Standard C. T. Co. v. P. R. R. Co.*, 88 N. J. L. 257.)

POUND, J. This action is to recover damages for the loss of merchandise delivered to defendant for transportation from Passaic, N. J., to New York city. It involves the proper construction of the latter portion of section 5, paragraph 3, of Uniform Bill of Lading which reads as follows:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on *private or other sidings*, wharves, or landing shall be at owner's risk until the cars are attached to and after they are detached from trains."

The purpose of this limitation of liability is to fix definitely a time when owner's risk terminates and carrier's risk begins.

If the property was received by the defendant on a "private or other" siding, it was at plaintiff's risk, as the car from which it was taken had not been attached to a train. The merchandise had been loaded by consignors upon a car which was placed on a track in front of their warehouse. This track had been constructed by defendant on its own land, east of its freight house, for the receipt and delivery of freight at a number of private

warehouses and was under its exclusive control. It extended from the freight house about a mile parallel with the main track. It was connected with the main track with two sets of switches. There is also a connecting piece of side track on which cars are placed for loading or unloading at defendant's freight house, but the track in question was used regularly by the warehouses in front of which it ran. It was a side track, a short track connected with the main track, a siding. Appellant contends that it is not a "private or other" siding. The majority of the court below held that the phrase in the bill of lading included within its terms *all* sidings, whether public or private. That meaning would be more clearly expressed by the use of the word "sidings" and a good rule of construction suggests that the words "or other" following the word "private" include not *all* sidings, but only sidings *like* private sidings. "When a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive" (*Matter of Hermance*, 71 N. Y. 481, 487), and the general words are restricted to those of the same kind (*ejusdem generis*). The minority held this particular siding was not a siding within the contemplation of the bill of lading; that it was merely an extension of defendant's freight depot, at which it received the property, but that conclusion seems to be based on proximity exclusively.

It was not a private siding. Private sidings include mainly those which are owned or maintained by shippers for the purpose of connecting their factories and warehouses with the tracks. They thus provide themselves with conveniences which the railroad fails to furnish. It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, like the freight station and yards. It was not a part of the railroad terminal or freight station. It was

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separated therefrom as effectively as if the warehouses had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto. It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantages of a private siding without the burden of private ownership. If any force is to be given to the words "or other," as qualifying rather than amplifying the word "private," they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished.

Cases dealing with the duty of carrier to shipper with regard to cars on such tracks do not aid us in finding a proper meaning of contractual words intended to limit liability, nor is it necessary to define the term "delivery on a private or other siding" which may present other questions. (*Jolly v. A., T. & S. F. Ry. Co.*, 21 Cal. App. 368; *N. Y. Central & H. R. R. Co. v. General Electric Co.*, 219 N. Y. 227.)

I, therefore, recommend that the judgment appealed from be affirmed, with costs.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, CRANE and ANDREWS, JJ., concur.

Judgment affirmed.

EDWARD D. MURPHY et al., Appellants, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Respondent.

Carriers — common-law rule that charges of carrier shall be reasonable — effect of provisions of statute (Public Service Commissions Law, Cons. Laws, ch. 48) relating to charges of common carriers — effect of ruling of commission that charges were excessive and that shipper was entitled to recover them — such charges cannot be recovered in common-law action on ruling of commission if paid without objection or protest.

1. It is a rule of the common law that a common carrier should charge, in a particular case, a reasonable compensation for the carriage or service rendered. It also authorizes an action at law by the injured shipper or consignee to recover moneys paid, under protest or duress of goods, as exorbitant or unreasonable charges. The right to recover the moneys may, however, under the laws of this state be waived by a voluntary payment.

2. The requirements of the Public Service Commissions Law (Cons. Laws, ch. 48, §§ 26, 28, 29, 40, 48, 49 and 57) are merely declaratory of the common law and mandatory that a rate or charge fixed by law or by the commission shall not be exceeded, and authorize the commission, upon a complaint, to investigate any illegal act done or omitted to be done and require the carrier complained of to satisfy the cause of complaint in whole or to the extent which the commission may require, but the commission may not, as the result of an investigation, fix, by a finding, or a resolution or an order, to be proof in the courts of the ultimate fact to be determined, that a complainant is entitled to recover from the carrier a designated sum for and on account of exaction by the carrier of unjust and unreasonable charges.

3. A determination of the public service commission at a particular time that a rate is unreasonable and the fixing of a reasonable rate is not a determination that the destroyed rate has been unreasonable throughout its existence or for any certain part of its existence or that its excess above the reasonable rate can be measured for any certain time by the difference between the two rates or is it the true measure of the damages sustained by the exaction.

4. Where track storage charges for cars conveying intrastate shipments, delivered to plaintiffs made by defendant railroad company, pursuant to and in accordance with schedules filed by it with the public service commission, were paid by plaintiffs and thereafter

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plaintiffs filed with the public service commission a complaint that the charges were unjust and unreasonable and the commission, after a hearing, adopted a resolution to the effect that the plaintiffs were entitled to recover from the defendant the charges upon the ground that they were unreasonable and unjust exactions, and the defendant refused to pay such charges, the plaintiffs cannot recover them in an action where neither any allegation nor finding discloses any objection or protest against the charges, other than the complaint filed with the public service commission.

Murphy v. N. Y. C. R. R. Co., 170 App. Div. 788, affirmed.

(Submitted December 10, 1918; decided February 25, 1919.)

APPEAL from a judgment, entered January 15, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury and directing a dismissal of the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Herman Hoffman and *Wallace S. Fraser* for appellants. While the Public Service Commissions Law does not expressly compel or authorize reparation by enforcement of its order by execution or other judicial process, the courts of the state, having jurisdiction of the amounts in controversy, will adopt the findings of the commission as *prima facie* evidence of the facts, and award reparation by judgment for damages, unless, of course, the commission has exceeded its powers in making its determination. (*People ex rel. N. Y. & Q. Gas Co. v. McCall*, 219 N. Y. 84; *State v. Great Northern Railway*, 153 N. W. Rep. 247; *N. Y. Central & H. R. R. Co. v. Murphy*, 225 Fed. Rep. 407; *Wilson v. L. I. R. R. Co.*, N. Y. L. J. June 29, 1917.) The resolution of the public service commission is *res adjudicata* against the defendant. (*People ex rel. McCabe v. Matthies*, 179 N. Y. 250; *People ex rel. Laughlin v. R. R. Comrs.*, 158 N. Y. 428; *People v.*

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N. Y., *L. E. & W. R. R. Co.*, 104 N. Y. 58.) Where the commission awards reparation which the carrier refuses or neglects to pay, its findings may properly be enforced in the state courts in the same manner as the procedure of the Interstate Commerce Act in the Federal courts. (*Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *Root v. L. I. R. R. Co.*, 114 N. Y. 300; *Lough v. Outerbridge*, 143 N. Y. 271; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Baxendale v. Gt. Western Ry. Co.*, 16 C. B. N. S. 137; *Gt. Western Ry. v. Sutton*, L. R. 4 H. L. 226; *People ex rel. Hatzel v. Hall*, 8 N. Y. 127.)

Alexander S. Lyman and *William Mann* for respondent. The Appellate Division correctly held that the public service commission has no power to make a binding adjudication directing the carrier to refund to the consignee of property all or any part of the charges collected by the carrier pursuant to the provisions of its filed tariffs. (Cons. Laws, ch. 48, § 28; *Armour Packing Co. v. U. S.*, 209 U. S. 56; *Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Texas & Pacific R. R. Co. v. Mugg*, 202 U. S. 242; *B. & O. v. La Due*, 128 App. Div. 594; *N. Y. C. & H. R. R. Co. v. Smith*, 62 Misc. Rep. 526; *Lehigh Valley R. R. Co. v. Meeker*, 236 U. S. 412; *Lehigh Valley R. R. Co. v. American Hay Assn.*, 219 Fed. Rep. 539.)

COLLIN, J. The plaintiffs seek to recover moneys charged by and paid the defendant for the use of track space occupied by freight cars, consigned to them, beyond a certain fixed or "free" time for unloading, known as "track storage" charges. The cars were all intrastate shipments, and were delivered to the plaintiffs between November first, 1907, and May twentieth, 1910. The charges were paid as follows: Twelve dollars on December seventeenth, 1907; twenty dollars on

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July twenty-seventh, 1908; fifty-eight dollars on December twenty-ninth, 1909; thirty-eight dollars on November eleventh, 1910, and fifty dollars on June fourteenth, 1911. They were made pursuant to and in accordance with the schedules of tariffs and rules filed with the public service commission of the state prior to November first, 1907, and existing at the time they were paid. In or about the month of May, 1911, the plaintiffs filed with the public service commission a complaint that the charges were unjust and unreasonable. The commission, after a hearing, adopted, December 5, 1912, a resolution of the effect that the plaintiffs were entitled to recover from the defendant the charges upon the ground that they were unjust and unreasonable exactions. Neither allegation nor finding discloses any objection or protest against the charges, other than the complaint filed with the public service commission. The defendant did not attempt to obtain a review of the resolution. It refused to repay the charges, and for their recovery this action is brought. Such are, in effect, the facts proved by the stipulation of the parties and found by the trial court. The Appellate Division rightly reversed the judgment of the trial court and dismissed the complaint.

A rule of the common law is that a common carrier should charge, in each particular case, a reasonable compensation for the carriage or service rendered, and no more. It sprung from the fact that the property of the carrier has been devoted to a public use. The common law authorizes an action at law by the injured shipper or consignee to recover moneys paid, under protest or duress of goods, as exorbitant or unreasonable charges. The right to recover the moneys may, however, under the law of this state, differing in such respect from that of many other jurisdictions, be waived by the voluntary payment of them. (*Killmer v. New York Central & H. R. R. Co.*, 100 N. Y. 395; *Strough v. New York*

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Central & H. R. R. Co., 92 App. Div. 584, affirmed, 181 N. Y. 533; *Harmony v. Bingham*, 12 N. Y. 99; *Lough v. Outerbridge*, 143 N. Y. 271.) Under the pleadings and proof the plaintiffs here are, manifestly, not entitled at common law to a recovery. Thus much is, in effect, conceded in the briefs of counsel.

The action is grounded in, and is sought to be maintained in virtue of, provisions of the Public Service Commissions Law (Cons. Laws, chapter 48). It is of course true that the state has the right, through the public service commission lawfully vested by it with authority, to prescribe what shall be reasonable charges of common carriers for intrastate transportation and services throughout the territory, unless restricted by the constitutional power of Congress. The Federal Act to Regulate Commerce contemplated no interference therewith. (*Minnesota Rate Cases*, 230 U. S. 352.) The action at bar asserts the doctrine that the public service commission is empowered to determine that a rate or charge for intrastate transportation duly scheduled and filed with it has been, through a period of years during which it has been filed and paid, and is, unreasonable and unjust, that the payor is entitled to recover from the carrier the excess fixed by the commission beyond the reasonable charge, and that the determination of the commission is *prima facie* proof in the courts of the state of the facts determined. We cannot discern in the statute such legislative intent.

The Public Service Commissions Law directs that every common carrier shall file, print and keep open to public inspection schedules showing rates for transportation by it within the state and, separately, all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, which the commission may, in its discretion, and the carrier may, under certain conditions and requirements,

from time to time change. (Sections 28, 29.) Compliance by the carrier with the provisions of these sections does not tend to establish that the scheduled rates or charges are reasonable. (*People ex rel. New York Central & H. R. R. Co. v. Public Service Comm.*, 215 N. Y. 241.) All the parties interested, the shipper, the consignee and the carrier, are bound to possess a knowledge of and to act in conformity with the scheduled rates and charges. (Sections 33, 34; *Pennsylvania Railroad Co. v. Titus*, 216 N. Y. 17.) The statute directs that all charges by the carrier for transportation or service "shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter." (Section 26.) Such provision is (a) merely declaratory of the common law, and (b) mandatory that a rate or charge fixed by a law or an order of the commission should not be exceeded. It, equally with the common law, fails to support the instant action. The statute authorizes the commission under a complaint and prescribed procedure to investigate as to any illegal act or thing done or illegally omitted to be done by any common carrier subject to its supervision. If the carrier "shall make reparation for any injury alleged and shall cease to commit, or to permit, the violation of law, franchise or order charged in the complaint, and shall notify the commission of that fact before the time allowed for answer, the commission need take no further action upon the charges. If, however, the charges contained in such petition be not thus satisfied, and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate such charges in such manner and by such means as it shall deem proper, and take such action within its powers as the facts justify," and it shall make and file an order either dismissing the complaint or directing the carrier to satisfy the cause of complaint

in whole or to the extent which the commission may specify and require. (Section 48.) Section 49 treats of "rates and service to be fixed by the commission." It is exceedingly detailed and comprehensive and neither admits of nor requires a full statement here. Its present relevancy consists of its empowerment of the commission to fix by order the just and reasonable rates and charges to be thereafter observed by the carrier. The appellants assert that the enactments referred to by us within sections 48 and 49 authorized the commission to determine and to order that the plaintiffs were entitled to recover from the respondent the designated sums with interest, and that the determination or order, although not self-executing, was, in the courts of the state, an adequate basis for a judgment awarding the plaintiffs reparation in that sum. In connection with them the appellants direct our attention to section 40 providing that a carrier shall be liable in any court of competent jurisdiction to the persons or corporations injured by its acts or omissions which are illegal under the law of the state or an order of the commission. It is manifest that section 40 is of a general application and relates to the right of action it defines, with the intention that the right shall be enforced in accordance with the ordinary rules of procedure and evidence obtaining in the courts.

We return to sections 48 and 49. The enactments within them, relevant here, are those providing for a complaint against the carrier and if it shall appear to the commission that there are reasonable grounds for the charges in the complaint, "it shall investigate such charges in such manner and by such means as it shall deem proper, and take such action within its powers as the facts justify. 3. Whenever either commission shall investigate any matter complained of by any person or corporation aggrieved by any act or omission of a common carrier, railroad corporation or street railroad

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corporation under this section it shall be its duty to make and file an order either dismissing the petition or complaint or directing the common carrier, railroad corporation or street railroad corporation complained of to satisfy the cause of complaint in whole or to the extent which the commission may specify and require." (Section 48.) There is not a basis or support for the assertion and arguments of the appellants, in the provision that the commission shall investigate and "take such action within its powers as the facts justify." The provision relates to the authority to investigate and the conducting of the investigation. It authorizes the commission to employ in the investigation all the general powers relating to mandates and process given it by the statute, which the facts justify. (*Willcox v. Richmond Light & R. R. Co.*, 142 App. Div. 44; affirmed, 202 N. Y. 515.) This is clearly shown by subdivision 3 which provides and defines the only adjudication, determination or order which the commission can make as the outcome or result of the investigation, in enacting that it, the investigation being completed, shall make and file an order dismissing the complaint or directing the carrier to satisfy the cause of complaint in whole or to the extent which the commission may specify and require. We conclude that the legislature did not intend in and by the provisions of section 48 that the commission might, as the result of an investigation, fix by a finding or a resolution or an order, to be proof in the courts of the ultimate fact determined, that the complainant was entitled to recover from the carrier a designated sum for and on account of exaction by the carrier of unjust and unreasonable charges. There is not any language in the section which suggests, and much less justifies, the opposite conclusion. Interpretation must be limited to the words used by the legislature. Otherwise it is sheer judicial legislation. Manifestly the language of the

subdivision 3 which we have quoted contemplated an order, involving obedience on the part of the carrier, enforceable by the commission in virtue of and in accordance with section 57, and efficient, through fulfillment, to satisfy, as ordered, the cause of the complaint. There is not within it a reasonable basis for the decision that the legislature was destroying an established rule of evidence and creating as a substitute the new rule that an order made pursuant to it should be *prima facie* evidence in the courts of the liability of the carrier. We need not make a reference to section 49 other than that already made, because it is evident that the resolution of the commission of December 5, 1912, was not within its power to determine the just and reasonable rates, fares or charges to be thereafter observed by the carrier, or other power conferred by the section. We do not find in the statute authorization to the commission to adopt the resolution or determination and it was and is inoperative as an adjudication.

The appellants argue that the authority to determine that an existing rate or charge is unjust and unreasonable and to fix the just and reasonable rate or charge includes, necessarily, the power to determine the measure of the excess paid, and, therefore, they argue, the commission can, through implied power, award reparation even as the interstate commerce commission can under the Federal act, which not only grants that commission the authority to determine that an existing rate or charge is unjust and unreasonable and to fix the just and reasonable rate or charge to be thereafter observed in such case as the maximum to be charged (Act to Regulate Commerce, section 15), but, in addition, expressly provides that upon a complaint for the recovery of damages because of unreasonable charges filed within two years from their accrument the commission shall investigate and make a report in writing containing findings of fact

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with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found; and if it determine that any party complainant is entitled to an award of damages under the provisions of the act for a violation thereof, it shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant may, within one year from the date of the order, institute suit in the Federal court by a petition setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of it the findings and order of the commission shall be *prima facie* evidence of the facts therein stated. (Id. sections 13, 14, 15, 16.) The appellants further argue that the award of reparation so made is a binding adjudication upon the parties. The argument of appellants is in its very beginning unsound. The determination, at a particular time, that a rate is unreasonable, and the fixing of a reasonable rate are not a determination that the destroyed rate has been unreasonable throughout its existence or for any certain part of its existence or that its excess above the reasonable rate can be measured for any certain time by the difference between the two rates or is the true measure of the damages sustained by the exaction. (*Municipal Gas Company of the City of Albany v. Public Service Commission*, 225 N. Y. 89; *Baer Brothers Mercantile Co. v. Denver & R. G. R. R.*, 233 U. S. 479; *People ex rel. New York Central & H. R. R. Co. v. Public Service Commission*, 215 N. Y.

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The Federal law prohibits every unjust and unreasonable rate or charge. (Section 1.) It provides that a common carrier shall be liable to the person or persons injured for the full amount of damages sustained in consequence of its unlawful or forbidden act. It empowers the interstate commerce commission to determine that an existing rate or charge is unjust and to fix a just and reasonable charge. To empower it, however, to determine the sum of the damages resulting to a complainant from the unjust charge and constitute its findings and order of determination *prima facie* evidence of the facts at issue in the courts, express enactments to such effect, which are wholly lacking in the Public Service Commissions Law, were deemed and were essential. (*Lehigh Valley R. Co. v. Clark*, 207 Fed. Rep. 717; *Lehigh Valley R. Co. v. Meeker*, 211 Fed. Rep. 785.) The legislature of this state apparently placed in section 48 the provision: "If the person or corporation complained of shall make reparation for any injury alleged and shall cease to commit, or to permit, the violation of law, franchise or order charged in the complaint, and shall notify the commission of that fact before the time allowed for answer, the commission need take no further action upon the charges," from the provision in section 13 of the Federal act: "If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of;" but did not carry into the statute the enactments of the Federal act, in virtue of which the created commission received and possessed the authority to determine through evidence and declare through findings the damages a complainant had sustained by reason of a rate or charge found to be unjust

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or unreasonable, and in virtue of which those findings are in the courts *prima facie* evidence of the facts found.

The question as to whether or not a party claiming to have been injured by a rate or charge declared unreasonable by the public service commission may, after such declaration, maintain an action at common law to recover his damages is not presented or argued to nor considered by us. It is of course true that scheduled and filed rates, existing at any time, cannot be attacked in a common-law action. This, obviously, is necessary in order to preserve equality and uniformity in rates and the carrying out of the system intended and established by the Public Service Commissions Law. (*Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506.)

The judgment should be affirmed, with costs.

CHASE, J. (dissenting). Between November 1, 1907, and May 20, 1910, the plaintiffs received from the defendant within the city of New York consignments of freight from points within this state. They paid "demurrage" and "track storage" charges in connection therewith. The defendant had duly filed with the public service commission and published its schedules of rates, fares and charges as provided by the Public Service Commissions Law (Consolidated Laws, chapter 48). During the time mentioned the defendant's schedules so filed and published provided: "For the first 48 hours after car is placed on delivery track (time to be computed from first 7:00 A. M. after car is placed) no charge will be made. For the next succeeding two days the charge will be \$1.00 per car per day or fraction thereof. For the next two days the charge will be \$2.00 per car per day or fraction thereof. For the next two days the charge will be \$3.00 per car per day or fraction thereof. For each succeeding day the charge will be \$4.00 per

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car per day or fraction thereof. Sundays and legal holidays are excepted." The charge therein provided is known as "track storage" charge and was in force when the plaintiffs received their freight.

Said schedules also provided: "Sundays and legal holidays excepted for the first 48 hours after car is placed on team track for delivery (time to be computed from the first 7:00 A. M. after car is placed) no charge will be made. For the next succeeding two days the charge will be \$1.00 per car per day or fraction thereof. For each succeeding day the charge will be \$2.00 per car per day or fraction thereof." The charge therein provided is known as "demurrage." Said schedules also provided for a refund of demurrage "When the condition of the weather during the prescribed free time is such as to make it impossible to employ men or teams in unloading cars without serious injury to freight. When shipments are frozen so as to prevent unloading during the prescribed free time, or when because of high water or snow drifts it is impossible to get to cars for unloading during the prescribed free time." The schedules did not contain any similar provision for refunding track storage charges.

During the time mentioned the plaintiffs paid demurrage and \$187 for track storage when as claimed by them the weather conditions made it impossible to unload the cars so held within the prescribed free time. They made application to the defendant to refund both the demurrage and track storage charges so paid. The defendant refunded the demurrage but refused to refund the track storage charges. The plaintiffs then filed a complaint with the public service commission claiming unlawful exaction of track storage charges and asked that its claim be determined and that the defendant be directed to repay to them said charges. The defendant served an answer to the complaint and proceedings were had

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before said commission which resulted in an order in substance that the plaintiffs are entitled to recover from the defendant the amount of track storage charges paid for the same time for which the plaintiffs have had returned to them by the defendant demurrage charges on account of weather conditions, as stated in the schedules.

No appeal or proceeding to review the proceeding before the commission has ever been taken. The trial court found as a conclusion of law that the order of the commission "is in effect a finding of an unjust discrimination against the plaintiffs and until reversed or annulled it is binding upon the defendant in this action." On the complaint of the plaintiffs and others the public service commissions of this state and the interstate commerce commission directed that the defendant make the regulation about repaying demurrage at times of interference in unloading cars through weather conditions that we have quoted applicable to track storage charges. The schedules of the defendant were changed accordingly August 1, 1911. (*N. Y. C. & H. R. R. Co. v. Murphy*, 224 Fed. Rep. 407.)

"All charges made or demanded by any such corporation, (one engaged in the transportation of passengers, or property from one point to another within the state of New York) * * * for the transportation of passengers or property or for any service rendered or to be rendered in connection therewith, as defined in section two of this chapter, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction and made as authorized by this chapter. Every unjust or unreasonable charge made or demanded for any such service or transportation of passengers or property or in connection therewith or in excess of that allowed by law or by order of the commission is prohibited." (Public Service Commissions Law, § 26.)

"In case a common carrier shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of the state of New York, by this chapter or by an order of the commission, such common carrier shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom * * *." (Public Service Commissions Law, § 40.) If the charge for track storage was unjust and unreasonable it was prohibited and the defendant is liable to the plaintiffs therefor. If unjust and unreasonable, provision at least should have been made in the schedules for its repayment the same as for repayment of demurrage. The complaint in this action expressly alleges that the track storage charges of the defendant, when by reason of weather conditions the freight in the cars could not be removed, were "unjust, unreasonable, unlawful and arbitrary." This allegation of the complaint was denied by the answer.

If the court had determined the issues thus joined in favor of the plaintiffs without considering the allegations in the pleadings and in the stipulation relating to the proceeding before the public service commission, such determination and the order in connection therewith would be sustained by the acts of the defendant and its discrimination between demurrage and track storage charges under the same conditions. In view of all the findings of the court the judgment rendered herein may not be wholly dependent upon the jurisdiction of the public service commission to make the order that we have mentioned. The respondent, however, urges that the judgment is wholly dependent upon the jurisdiction of the public service commission to make the conclusion of law quoted. It urges that the public service commis-

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sion has no power to determine as between the parties hereto the question whether charges theretofore made for track storage, when weather conditions prevented unloading the freight from the cars, are unjust and unreasonable.

The statute provides: "Each commission shall have the general supervision of all common carriers, railroads, street railroads, railroad corporations and street railroad corporations within its jurisdiction as hereinbefore defined, and shall have power to and shall examine the same and keep informed as to their general condition * * *; also with respect to their compliance with all provisions of law, orders of the commission and charter requirements." (Public Service Commissions Law, sec. 45, subd. 2.)

It is also provided in the statute that "Each commission shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry out the purposes of this chapter." (Public Service Commissions Law, § 4.)

"Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation * * * affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, * * * the commission * * * shall determine the just and reasonable rates, fares, and charges to be thereafter observed and enforced as the maximum to be charged for the service to be performed * * * and shall fix the same by order to be served upon all common carriers * * * by whom such rates, fares and charges are thereafter to be observed." (Public Service Commissions Law, § 49.)

"Complaints may be made to the proper commission

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by any person or corporation aggrieved, by petition or complaint in writing setting forth any thing or act done or omitted to be done by any common carrier * * * in violation, or *claimed to be in violation, of any provision of law* or of the terms and conditions of its franchise or charter or of any order of the commission. Upon the presentation of such a complaint the commission shall cause a copy thereof to be forwarded to the person or corporation complained of, which may be accompanied by an order, directed to such person or corporation, requiring that the matters complained of be satisfied, or that the charges be answered in writing within a time to be specified by the commission. If the person or corporation complained of shall make *reparation for any injury alleged* and shall cease to commit, or to permit, the violation of law, franchise or order charged in the complaint, and shall notify the commission of that fact before the time allowed for answer, the commission need take no further action upon the charges. If, however, the charges contained in such petition be not thus satisfied, and it shall appear to the commission that there are reasonable grounds therefor, it shall investigate such charges in such manner and by such means as it shall deem proper, and take such action within its powers as the facts justify." (§ 48, subd. 2.)

"Whenever either commission shall investigate any matter complained of by any person or corporation aggrieved by any act or omission of a common carrier, * * * under this section it shall be its duty to make and file an order either dismissing the petition or complaint or directing the common carrier . * * complained of to satisfy the cause of complaint in whole or to the extent which the commission may specify and require." (§ 48, subd. 3.)

It is apparent from the general character of the provisions of the Public Service Commissions Law that it

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was the purpose and intent of the legislature to give to the public service commissions full and complete authority to determine as between common carriers and shippers whether the freight rates and charges as stated in the schedules are just and reasonable. While the commissions are not given power to *enforce reparation* for an injury, they are given power to receive complaints for an "act done" by a common carrier in violation of the provision of the statute requiring in substance that its freight rates and charges shall be reasonable, and in case on notice *reparation for injury* is not made and such common carrier does not cease to violate the law then to investigate the charges and take such action within its power as the facts justify. The action within its power in this case was to determine whether the charges exacted *were just and reasonable*. It is left to the courts to enforce a liability on the part of common carriers to shippers through the collection of unreasonable freight rates and charges. So far as appears the schedules filed by the defendant were never formally adopted and approved by the public service commissions. They included charges for demurrage and track storage as we have hereinbefore stated.

When the matter was brought to the attention of the commission and after a hearing as provided by statute, the order was made which was in effect a finding that such charges so far as they are for days when the weather conditions made it impossible or impractical to unload the cars were unjust and unreasonable. The statute contemplates past as well as future charges, otherwise it would not have made the discontinuance of a proceeding before it dependent in any respect upon the reparation of an injury caused by exacting unjust and unreasonable charges. The admitted facts in this case tend to establish that the charges for track storage were unjust and unreasonable and it was admitted that the

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public service commissions on hearing duly had, determined not only that the charges were unjust and unreasonable but that the defendant should repay such unjust and unreasonable charges to the plaintiffs.

The judgment of the Trial Term is supported by the findings on which it is based. The judgment of the Appellate Division should be reversed, with costs in the Appellate Division and in this court, and the judgment of the Trial Term affirmed.

HISCOCK, Ch. J., CARDOZO and ANDREWS, JJ., concur with COLLIN, J.; CUDDEBACK and POUND, JJ., concur with CHASE, J.

Judgment affirmed.

GEORGE BULLOCK, Respondent, v. JAMES S. COOLEY, as District Superintendent of the First Supervisory District of Nassau County, et al., Appellants, Impleaded with Others.

Public schools — constitutional law — dissolution and consolidation of school districts — powers of district superintendent in such matters under the statute (Education Law, Cons. Laws, ch. 16, § 129) — provision of statute permitting appeals to state commissioner of education constitutional and valid and his decision on appeal from an order of consolidation not open to review in the courts.

1. Under the statute (Education Law, Cons. Laws, ch. 16, § 129) a district superintendent may, without the consent of the districts, dissolve one or more school districts and may unite the territory thereof to any adjoining district, except a union free school district whose boundaries are coterminous with the boundaries of an incorporated village or city. A distinction is made in the Education Law between the alteration of the boundaries of a school district and the dissolution, reformation and consolidation of districts (§§ 123-129).

2. Section 890 (formerly 880) of the Education Law, permitting appeals to the state commissioner of education and making his decision on such appeals final and conclusive, is constitutional and valid. The

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purpose of this statute is to put all controversies over school matters in his charge and to remove them, as far as practicable, from the courts, and hence, a decision of the state commissioner of education on an appeal from an order of consolidation is not open to review in the courts.

3. Where two school districts in the town of Oyster Bay were dissolved and united with another district, the fact that one of those districts is an island separated from the mainland and the district with which it is united, by the waters of Oyster bay, from half a mile to about a mile wide, which is a part of Long Island sound, does not prevent the consolidation. School districts may be considered as adjoining for school purposes even when divided by creeks or other natural boundaries.

4. Where the determination of the district superintendent, in such case, was made after examination of all the facts and circumstances, it cannot be held to be arbitrary or without a basis of jurisdiction upon the law and the facts and the court will not set aside his determination at the instance of a subordinate school officer who has first subjected himself by appeal to the jurisdiction and authority of the commissioner of education and only sought relief from the courts after his failure to succeed in the proceeding specially designed to settle controversies in school matters.

Bullock v. Cooley, 183 App. Div. 529, reversed.

(Argued January 9, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered July 6, 1918, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of defendants, entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment in favor of plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

Frank B. Gilbert for James S. Cooley, as district superintendent, appellant. The court below erred in its interpretation of section 129 of the Education Law in so far as it held that school districts Nos. 7 and 10 of the town of Oyster Bay could not under such section be dissolved and the territory thereof annexed to union

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free school district No. 9 of such town. (*Mahler v. N. & N. Y. Transp. Co.*, 35 N. Y. 352; *Matter of U. B. Material Co.*, 137 App. Div. 893.) The order of the district superintendent is not void because made without the consent of the trustees of the dissolved districts. The order was executed under section 129 of the Education Law, which does not require the consent of the trustees of the dissolved districts. (*State Board v. Halliday*, 150 Ind. 216; *Kelly v. Multnomah Co.*, 18 Ore. 356; *City of New York v. New York City Railway Co.*, 193 N. Y. 543; *Grimmer v. Tenement House Dept.*, 205 N. Y. 549; *Kings County Lighting Co. v. City of New York*, 176 App. Div. 175.) The plaintiff having submitted the controversy as to the consolidation of district No. 7, Oyster Bay, with union free school district No. 9 of such town to the commissioner of education, he is bound by the decision of the commissioner on such appeal and the validity of the order of consolidation as affirmed by the commissioner may not be questioned in this action. (Code Civ. Pro. § 1926; *Welker v. Lathrop*, 210 N. Y. 434; *People ex rel. Jennings v. Finley*, 175 App. Div. 204; *People ex rel. Bd. of Education v. Finley*, 211 N. Y. 51.)

William D. Guthrie for Board of Education of Union Free School District No. 9 of the Town of Oyster Bay et al., appellants. The territory of Centre island adjoins the Oyster Bay school district No. 9, within the intent and meaning of section 129 of the Education Law. (*United States v. Bevans*, 3 Wheat. 336; *Matter of United Building Material Co.*, 137 App. Div. 893; *Mahler v. N. & N. Y. Transp. Co.*, 35 N. Y. 352; *Brown v. Burt*, 81 L. J. Rep. 17; *Cunningham's Case*, Bell's Crown Cas. 72; *D. U. S. Cable Co. v. A. A. Tel. Co.*, L. R. 2 App. Cas. 394; *Cave v. Horsell*, 1912, 3 K. B. 533; *Vestal v. Little Rock*, 54 Ark. 321.) The consolidation order is not

void because made without the consent of the trustees of the dissolved districts. (*McCluskey v. Cromwell*, 11 N. Y. 593; *Grimmer v. Tenement House Dept.*, 205 N. Y. 549; *People ex rel. Werner v. Prendergast*, 206 N. Y. 405; *New Haven R. R. Co. v. Interstate Commerce Com.*, 200 U. S. 361; *United States v. Hermanos y Compania*, 209 U. S. 337; *Copper Queen Mining Co. v. Arizona Board*, 206 U. S. 474; *Langlo v. Raymond*, 90 App. Div. 614; *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Caesar v. Bernard*, 156 App. Div. 724.)

William N. Dykman, Alfred T. Davison and James K. Foster for respondent. Common school district No. 7 and union free school district No. 9 are not adjoining school districts within the meaning of the Education Law. (*Holmes v. Carley*, 31 N. Y. 289; *Matter of Ward*, 52 N. Y. 395; *Child v. Starr*, 4 Hill, 369; *Bechtel v. Village of Edgewater*, 45 Hun, 240; *Saranac L. & T. Co. v. Roberts*, 208 N. Y. 288; *Caddy v. Interborough R. T. Co.*, 195 N. Y. 415; *Baxter v. York Realty Co.*, 128 App. Div. 79; *Coventry v. L. B. & S. C. Ry. Co.*, L. R. 5 Eq. 104; *Haynes v. King*, 1893, 3 Ch. Div. 439; *Matter of Bateman*, 1899, 1 Ch. Div. 599.) The order of the district superintendent is void because made without the consent of the trustees of the districts sought to be dissolved. (*People ex rel. Light v. Skinner*, 159 N. Y. 162.) Section 880 (now 890) of the Education Law does not deprive the courts of this state of jurisdiction in this action. (*People ex rel. Merrill v. Cooley*, 75 Misc. Rep. 188; *People ex rel. Underhill v. Skinner*, 74 App. Div. 58; *People ex rel. Light v. Skinner*, 159 N. Y. 162; *Haley v. Whitney*, 53 Hun, 119; *State ex rel. Bidgood v. Clifton*, 113 Wis. 107; *People ex rel. School Dist. v. Van Horn*, 20 Col. C. A. 215.)

CHASE, J. This action is brought by a taxpayer of former school district No. 7 of the town of Oyster Bay

in the county of Nassau to restrain the defendants from carrying out, perfecting or in any way enforcing an order of the district superintendent of the first supervisory district of Nassau county, comprising the towns of Oyster Bay and North Hempstead, by which said school district No. 7, and also school district No. 10 of said town of Oyster Bay were dissolved and the territory thereof united to union free school district No. 9 of said town. So far as appears before us all persons in any way interested in said districts or either of them assent to and acquiesce in carrying out said order except certain taxpayers of district No. 7. The order was made pursuant to the authority of section 129 of the Education Law (Cons. Laws, ch. 16), which is as follows:

“Any school commissioner (now district superintendent) may dissolve one or more districts, and may from said territory form a new district; he may also unite such territory or a portion thereof to any adjoining school district, except a union free school district whose boundaries are coterminous with the boundaries of an incorporated village or city.”

The boundaries of school district No. 9 are not coterminous with the boundaries of an incorporated village or city. The plaintiff challenges the jurisdiction of the district superintendent to make the order, the enforcement of which he seeks to prevent because: 1. It is alleged that consent was not obtained for the dissolution of school district No. 7 and its annexation to union free school district No. 9.

No consent is required for the dissolution, reformation and consolidation of districts pursuant to section 129 of the Education Law that we have quoted. A distinction is made in the Education Law between an alteration of the boundaries of a school district (Education Law, sections 123 to 128) and the dissolution, reformation and consolidation of districts. (Education Law, section

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129.) The distinction existed in the statute of 1894 (Chapter 556), as amended by chapter 264 of the Laws of 1896. It was frequently recognized and proclaimed by the department of education through the superintendent of public instruction prior to the consolidation of the Education Law in 1909. (*Matter of Dwyer*, University of the State of New York, Judicial Decisions 1822-1913, page 699; *Matter of Jones*, Id. page 709; *Matter of Stryker*, Id. page 735.)

The legislature with knowledge of the decisions of the department of education when it consolidated the school and educational laws continued the distinction between the alteration and the dissolution of a school district. The statutes have been practically construed as contended for by the appellants. Much weight should be given to the practical construction of a statute by the officers whose duty it is to enforce it. (*Kings County Lighting Co. v. City of New York*, 176 App. Div. 175; *City of New York v. N. Y. City Ry. Co.*, 193 N. Y. 543; *Grimmer v. Tenement House Dept.* N. Y., 205 N. Y. 549; *People ex rel. Williams v. Dayton*, 55 N. Y. 367.)

The doubt expressed in 1905 in *Matter of Jones* (*supra*) in regard to annexing the territory of a dissolved district to a union free school district without the consent of the school authorities of such district apparently led to the change in section 9 of title 6 of chapter 556 of the Laws of 1894, as amended by chapter 264 of the Laws of 1896, when in section 27 of the Education Law (Laws of 1909, chapter 21) the words "common or union free school" were inserted for the purpose, as stated in a note of the consolidators, of making the section conform to the usage of the department of education. Section 129 of the Education Law that we have quoted has been amended to authorize uniting the territory or a part thereof of a dissolved district to any adjoining school district, without

exception or limitation other than that it cannot be united to the territory of a union free school district whose boundaries are coterminous with the boundaries of an incorporated village or city.

2. It is alleged that the territory of school district No. 7 does not adjoin school district No. 9.

The territory of the state of New York as it extends easterly over Long Island is bounded on the north by the territory of the state of Connecticut. The boundary line between the states is specifically stated in chapter 57 of the Consolidated Laws (State Law, section 2). The county of Nassau and the town of Oyster Bay as a part of that county each include a part of the northern shore of Long Island. In *Mahler v. Norwich & N. Y. Transportation Company* (35 N. Y. 352, 359) this court say: "We think there is no force in the suggestion, that, if the State owns to the center of the sound, a considerable part of our domain is not partitioned into counties and towns. Even if the statute, in declaring the bounds of the counties bordering on the sound, had limited them, in terms, to the line of low-water mark, it would indicate nothing but the mere fact that the legislature deemed their extension to the exterior water-line of the State a matter of no practical importance; but in the absence of any such limitation, we are clearly of the opinion expressed by this court on a former occasion, that the respective counties and towns, which are bounded generally on the sound, comprehend within their limits the waters between their respective shores and the water-line of the State. This is the usual and reasonable rule in the political apportionment of territory, for the purpose of fixing the limits of civil and criminal jurisdiction." (*People v. Hulse*, 3 Hill, 309; *Matter of United Building Material Company*, 137 App. Div. 893.)

Oyster bay as a part of Long Island sound is a land-locked harbor. It opens into Cold Spring harbor on

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the east between Center island and a part of the main land known as Cove neck. The opening is about half a mile wide. That part of the town of Oyster Bay surrounding Oyster Bay harbor in 1916 was divided into school districts. Union free school district No. 9 included the territory south and west of the harbor. School district No. 10 included Cove neck and is east of the harbor. School district No. 6 lies northwest of the harbor and extends west along the northerly shore of Long island. School district No. 7 consists of Center island and extends north from the opening of the harbor and is east of a part of the harbor itself. It also extends southwesterly into and through the harbor until it comes within about one-half mile or perhaps a little more of Oyster Bay village in union free school district No. 9. The shore lines of the harbor along districts Nos. 7 and 9 are separated by the waters of the harbor which are from one-half mile to a mile or a little more in width. There is no land connection between district No. 7 and district No. 9 except over a narrow causeway at the northwesterly corner of the island leading to school district No. 6 along the southerly shore of Long Island sound and from which a highway leads to and through district No. 9.

Under the Consolidated School Law of 1864 (Laws of 1864, chapter 555, title 6, section 1) it was the duty of each school commissioner to divide so far as practicable the territory within his district into a convenient number of school districts and by section 120 of the Education Law all school districts organized either by special laws or under the provisions of a general law are continued and may be altered or dissolved as therein provided.

The Education Law plainly contemplates jurisdiction for educational purposes as therein provided over all of the territory of the state. Even if the boundaries of the districts mentioned as the same are filed in the

town clerk's office of the town of Oyster Bay are described as along the waters of Oyster Bay harbor, the lands under such waters, a part of the town of Oyster Bay, should for the purposes of the jurisdiction of the district superintendent in the matter now before us be deemed a part of the school districts. It is not uncommon to treat school districts as adjoining for school purposes when they are divided by creeks or other natural boundaries, or by direct reference to the sides of highways or canals. The purpose of the statute in confining the authority to unite districts or parts thereof to such as are adjoining, was to prevent districts being united for school purposes when intervening territory consisting of some other district or districts, or part or parts thereof, wholly separate and divide the districts or parts thereof sought to be united.

No school has been maintained on Center island since 1912. It is asserted that there are but six or seven children of school age residing in the district. Since 1912 contracts have been made from year to year by district No. 7 with union free school district No. 9 by which the latter district has provided school facilities in the schools in its district for the children of school age in district No. 7. The contract price paid by district No. 7 to district No. 9 has varied from time to time, but has not exceeded forty dollars each for such children. The practicability of uniting the territory of district No. 7 with that of district No. 9 for school purposes has been shown by several years of school experience. It is none the less practical for school purposes when all the taxable property included in the territory of the two districts bears its proportionate part of the tax burden than when the children of district No. 7 receive the advantages of the schools of district No. 9 by the payment of a stipulated consideration.

Prior to making the order dissolving said districts the

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subject of their dissolution had been investigated by the department of education, and in the order it was stated that "It appears that the sound course to pursue from the standpoint of good school administration and sound business policy is to consolidate school districts 7 and 10 with district 9. The report indicates that there are only seven children in district 7 and that these children have for a long period of time been attending the Oyster Bay school. It further appears that the taxpayers of district 9 are now bearing the burden of educating many of the children residing in districts 7 and 10 and that district 9 contains the homes of a large number of people who are employed by the owners of estates located in districts 7 and 10. It also appears that the village of Oyster Bay which is located in district 9 is the community center of all the people living in these three districts. It is added that the mail of all people in this district is received through the Oyster Bay post office and that the voters of these three districts vote at Oyster Bay." The order necessarily determined as a fact that the districts adjoined.

After the order was made the plaintiff in this action as the sole trustee of district No. 7 appealed to the commissioner of education from the order and from each and every part thereof. He disputed some of the recitals contained in said order and denied the authority of the district superintendent to make the same. After a full hearing and consideration by the commissioner the action of the district superintendent was approved and the appeal was dismissed. (11 State Dept. Rep. 517.)

It is provided by section 890 (formerly 880) of the Education Law that "Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of

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education may also institute such proceedings as are authorized under this act and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever." (Subd. 1.)

It is expressly provided by the section that an appeal may be made in consequence of any action "by any school commissioner (now district superintendent) and other officers, in forming or altering, or refusing to form or alter, any school district." (Subd. 2.) This express grant of power must be considered with the other provisions of the Education Law. By the Education Law the education department is charged with the general management and supervision of all public schools and all of the educational work of the state (Education Law, sec. 20), and the commissioner of education is the chief executive officer of the state system of education (Education Law, secs. 20, 94) and he is by the legislature recognized as having judicial functions. (Education Law, secs. 46, 94, 398, 890, 891, 892.) The authority of the commissioner of education to hear appeals as by the statute provided and the binding effect of his decision and that of his predecessors in authority have been a part of our statute law since 1822. (Laws of 1822, chapter 216.)

This provision was intended as a cheap and expeditious mode of settling most, if not all, of the difficulties and disputes arising in the course of the execution of the School Law. (*Easton v. Calendar*, 11 Wend. 90.)

After the decision in *People ex rel. Light v. Skinner* (159 N. Y. 162) and by the amendment of 1910 (Laws of 1910, chapter 140) the decisions of the commissioner of education made by him in the first instance were given the same conclusiveness as decisions made by him on appeal.

The purpose of the statute and of the amendment is to make all matters pertaining to the general school

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system of the state within the authority and control of the department of education and to remove the same so far as practicable and possible from controversies in the courts.

It has been frequently held that there is conferred upon the executive head of the education department power to review on the petition of a person aggrieved any decision mentioned in the School or Education Law. (*Welker v. Lathrop*, 210 N. Y. 434; *People ex rel. Jennings v. Finley*, 175 App. Div. 204. See *People ex rel. Board of Education N. Y. City v. Finley*, 211 N. Y. 51; *People ex rel. Peixotto v. Board of Education N. Y. City*, 212 N. Y. 463, 471.)

The State Constitution was revised and established in 1894 and it provides: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." It also provides: "The corporation created in the year 1784, under the name of the Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents." (Constitution State of New York, article 9, secs. 1, 2.) It was ratified by the people with knowledge and appreciation of the history of the free common schools of the state and of the University of the State of New York.

The determination of the question in this case, whether within the provisions of the Education Law said school districts adjoin, was dependent upon an examination of all the facts and circumstances before the superintendent. His determination of that question was not arbitrary, nor wholly without a basis of jurisdiction upon the law and upon the facts, and the court will not set aside his

determination particularly at the instance of a subordinate school officer who has first subjected himself by appeal to the jurisdiction and authority of the commissioner of education and only sought relief from the courts after his failure to succeed in the proceeding specially designed to settle controversies in school matters. (See *People ex rel. Yale v. Eckler*, 19 Hun, 609, 614.)

Even in a criminal case if there is some evidence before a magistrate upon which the judicial mind is called to act in determining the question of the probable guilt of an accused, the magistrate has jurisdiction and the process issued by him is valid as such. (*People ex rel. Perkins v. Moss*, 187 N. Y. 410.)

The determination of the commissioner of education upon the appeal involved matters of school administration and policy not without his jurisdiction and his decision is not subject to review by the courts so far as it pertained to such school administration and policy and but incidentally, if at all, affects property rights.

There are several other questions relating to the authority of the plaintiff to maintain this action, but what we have said makes it unnecessary to consider them on this appeal.

The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in the Appellate Division and in this court.

HISCOCK, Ch. J., CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., not voting.

Judgment reversed, etc.

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WILLIAM E. HANNA, Respondent, v. LOUIS LICHTENHEIN et al., Copartners under the Firm Name of LICHTENHEIN & STERN, Appellants.

Pleadings — statement of foreign law set forth as a defense in an action — when question of fact which may be admitted by demurrer — when statement of statutes and decision of foreign state presents question of law for the court.

1. Although full faith and credit shall be given in each state of the United States to the public acts, records and judicial proceedings of every other state (U. S. Const. art. 4, § 1), no court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice, but when, after proof is given, the questions involved depend upon the construction and effect of a statute or judicial opinion they are for the court and not questions of fact at all.

2. On a trial of an issue of fact when the evidence furnished is conflicting or inconclusive the law of a foreign state may be a question for the jury although ordinarily when the evidence is all furnished it is the function of the judge to decide as to the law of a foreign state.

3. An allegation in a pleading of the law of a sister state is an allegation of fact which is admitted by a demurrer. If the pleading sets forth in detail the statutes and decisions relied upon by the pleader, the question becomes one of law and should be determined as such by the court in deciding the demurrer. A demurrer does not admit the interpretation placed by a pleader upon the statutes and decisions specifically referred to or incorporated in a pleading.

4. When the allegations of a defense are general and by such allegations the law of foreign states named is stated to be as in the defense alleged, and the statutes or judicial decisions upon which the allegations are based are not before the court from which a conclusion of law can be reached, the demurrer should be overruled, with leave to plaintiff to withdraw the demurrer and leave the questions raised upon the pleadings for determination at the Trial Term.

Hanna v. Lichtenhein, 182 App. Div. 94, reversed.

(Argued January 6, 1919; decided February 25, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial depart-

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ment, entered March 8, 1918, which affirmed an order of Special Term denying a motion, by defendant, for an order overruling a demurrer to a defense set up in the answer and for judgment on the pleadings.

The action is brought to recover on five similar causes of action. In each cause of action it is alleged that on a day named, the Capital City Cap Company, a New Jersey corporation, assigned to Manufacturers' Finance Company, a Delaware corporation, and the assignor of the plaintiff certain accounts receivable, and that subsequent to such assignments the defendants collected the amounts due on the accounts receivable so assigned. Judgment is asked for the amount of the accounts so collected. The defendants answered each of said causes of action, and denied most of the allegations thereof, and as a separate defense to each of said causes of action alleged that the cap company is domiciled in the state of New Jersey, and has its principal office and place for the transaction of business in Trenton, in said state. That at the time when said accounts receivable mentioned in the complaint were assigned and transferred to the finance company, "It was mutually agreed by and between Manufacturers Finance Company and Capital City Cap Company that no notice that said accounts receivable would be or had been assigned, transferred and set over by Capital City Cap Company to Manufacturers Finance Company should be given to the debtors owing said accounts receivable or to any other person, firm or corporation, which said agreement was duly performed by Manufacturers Finance Company and Capital City Cap Company." That thereafter the cap company warranted and represented to the defendants that it was the owner and holder of said accounts receivable and that it had not assigned, transferred or set over the same or any part thereof to any person, firm or corporation. That thereupon the cap company for a valuable con-

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sideration paid to it by the defendants duly assigned, transferred and set over to them by an instrument or instruments in writing the said accounts receivable. That the defendants immediately thereafter served upon and delivered to the debtors of the cap company a notice in writing that the said accounts receivable owing by them respectively, had been assigned, transferred and set over by the cap company to the defendants. That the defendants became *bona fide* holders for value of each of said accounts receivable "Without knowledge or notice of the right, title or interest therein or thereto, if any, of either the Manufacturers Finance Company or the plaintiff or of the facts set forth in the complaint herein, or any of them."

They further alleged as a part of the defense that said accounts receivable were assigned, transferred and set over by the cap company to the finance company and to the defendants, in the state of New Jersey, and that the value advanced therefor, if any, by the finance company or plaintiff to the cap company was paid to said cap company in the states of New Jersey, Maryland and Pennsylvania.

They further alleged as a part of the defense: "That at all of the times in the complaint and herein mentioned it was and is the law of the State of New Jersey that as between successive assignees of a chose in action due to the same assignor, the one which being acquired without notice of prior ones, is first brought to the knowledge of the debtor is entitled to priority; and that claims of competing assignees of a chose in action rank as between themselves not in the order of the dates of the assignments to them, but according to the dates when they respectively gave notice to the debtor of the assignment of their chose in action; and that if an assignee of a chose in action fails to give notice to the debtor owing the same, a subsequent assignee of the same chose in action without

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notice of the former assignment, will upon giving notice of his assignment acquire priority."

There are similar allegations in the defense relating to the law of the states of Maryland and Pennsylvania. The plaintiff demurred to the defense upon the ground that it is insufficient in law upon the face thereof.

Daniel P. Hays and *Ralph Wolf* for appellants.

William F. Allen and *George M. Clarke* for respondent.

CHASE, J. Did the plaintiff by his demurrer admit the allegations of the defense relating to the law of sister states? If the law of said sister states as correctly construed and interpreted is as alleged in the defense, the demurrer should be overruled and the questions arising on the pleadings left to be determined at the trial. We think the judgment should be reversed and the demurrer overruled.

The relations of the United States to each other, in regard to all matters not surrendered to the general government by the national Constitution, are those of foreign states in close friendship, each being sovereign and independent. (Greenleaf on Evidence [16th ed.], vol. 1, section 489; *Hanley v. Donoghue*, 116 U. S. 1.)

Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. (Constitution of the United States, article 4, section 1.)

No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. (*Hanley v. Donoghue*, *supra*; *Edwards v. Schillinger*, 245 Ill. 231.) They are admitted by demurrer. (*Miller v. Aldrich*, 202 Mass. 109.) Foreign law is a question of fact and must be proved as such, but when after such proof is given the questions involved

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depend upon the construction and effect of a statute or judicial opinion they are for the court and not questions of fact at all. (*Bank of China, etc., v. Morse*, 168 N. Y. 458, 470.)

On a trial of an issue of fact when the evidence furnished is conflicting or inconclusive the law of a foreign state may be a question for the jury although ordinarily when the evidence is all furnished it is the function of the judge to decide as to the law of a foreign state. (*Ufford v. Spaulding*, 156 Mass. 65; *Hancock National Bank v. Ellis*, 172 Mass. 39, 49.)

An allegation in a pleading of the law of a sister state is as we have stated an allegation of fact which is admitted by the demurrer. If the pleading sets forth in detail the statutes and decisions relied upon by the pleader, the question becomes one of law and should be determined as such by the court in deciding the demurrer. A demurrer, in other words, does not admit the interpretation placed by a pleader upon the statutes and decisions specifically referred to or incorporated in a pleading.

In *Finney v. Guy* (189 U. S. 335) there was before the court the state statutes together with a reference to the decisions of the state courts, and the pleader by making an averment of the law of the sister state in the form relied upon by him, submitted to the court the meaning of such statute and decisions. It was in that case held in substance that while a demurrer admitted the existence of the decisions and the statutes it did not necessarily admit the interpretation placed upon them by the pleader or the legal conclusion reached by him therefrom.

In *Knickerbocker Trust Co. v. Iselin* (185 N. Y. 54) the complaint alleged that by virtue of certain statutes of the state of Maryland enumerated as defined, construed, administered and enforced by the courts of said state, the defendant was personally and individually indebted to the plaintiff in an amount stated. The demurrer although admitting the pleading in the form in

which it was prepared permitted the court to determine the conclusion to be derived therefrom as a matter of law.

In this case the allegations of the defense under consideration are general and by such allegations the law of the states named is stated to be as in the defense alleged, and the statutes or judicial decisions upon which the allegations are based are not before the court from which a conclusion of law can be reached.

The orders should be reversed, without costs, and the defendants' motion to overrule the plaintiff's demurrer should be granted without costs, with leave to plaintiff to withdraw demurrer and leave the questions raised upon the pleadings for determination at the Trial Term, and the question certified should be answered in the affirmative.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur.

Orders reversed, etc.

FRANK MUSLUSKY, Appellant, v. LEHIGH VALLEY COAL COMPANY, Respondent.

Practice — special appearance — demand for copy of the complaint in an action is not an appearance, either general or special — motion to dismiss complaint for failure to serve denied.

1. A defendant may appear specially in an action only for the purpose of raising the question whether the court has obtained jurisdiction over him personally or through his property.

2. A demand for a copy of the complaint is not an appearance, either general or special. Defendant's general appearance can be made only in the manner indicated in section 421 of the Code of Civil Procedure.

3. A defendant who has appeared specially for the purpose of obtaining a copy of the complaint is not in a position to move to dismiss the complaint if no complaint is served. (§§ 479, 480.)

Muslusky v. Lehigh Valley Coal Co., 175 App. Div. 926, reversed.

[(Submitted January 29, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered November 29, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of Special Term denying a motion for an order, under section 480 of the Code of Civil Procedure, dismissing the complaint for failure to serve a copy thereof after a demand therefor had been served pursuant to section 479 of said Code, and granted said motion.

The facts, so far as material, are stated in the opinion.

Charles Goldzier and *Joseph Levy* for appellant. The Code of Civil Procedure does not authorize a demand for the service of a complaint without a general appearance in the action. (Code Civ. Pro. §§ 421, 479, 480; *Reed v. Chilson*, 142 N. Y. 152; *Farmer v. N. L. Assn.*, 138 N. Y. 265; *Couch v. Mulhane*, 63 How. Pr. 79; *Wood v. Furtick*, 17 Misc. Rep. 561; *Duino v. Arbuckle*, 166 App. Div. 86.) The defendant having appeared here solely to contend against the jurisdiction of the court, was not justified to utilize such appearance to compel the further prosecution of the action or to obtain a judgment therein in its favor. (4 Corpus Juris, 1318.)

Peter C. Mann for respondent. A special appearance for the purpose of saving and raising objections to the jurisdiction of the court has always been recognized as regular and proper practice. (*McClure Newspaper Syndicate v. Times Printing Co.*, 164 App. Div. 108; *Reed v. Chilson*, 142 N. Y. 152; *Goldey v. Morning News*, 156 U. S. 518.) The Code of Civil Procedure by implication clearly recognizes the right of a defendant to have a copy of the complaint in an action without interposing a general appearance. (Code Civ. Pro. § 479; *Kirewich v. P. & R. C. & I. Co.*, N. Y. L. J., Jan. 4, 1916; *Beisel v. L. V. Coal Co.*, N. Y. L. J., Feb. 17, 1916; *Lukosewicz v. P. & R. Coal & Iron Co.*, 173 App. Div. 965; *Agminas v. W. B. Colliery Co.*, 173 App. Div. 938; *Hoyt v. Ogden*

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P. C. Co., 185 Fed. Rep. 889.) The defendant, having served a demand for a copy of the complaint, is entitled to a dismissal upon the failure of the plaintiff to comply with this demand. (*Lukosewicz v. P. & R. Coal & Iron Co.*, 173 App. Div. 965; *Agminas v. W. B. Colliery Co.*, 173 App. Div. 938.)

POUND, J. The summons was delivered to the assistant secretary of defendant. Defendant, by its attorneys, served a notice of special appearance which contained a demand for a copy of the complaint. The special appearance was stated in the notice to be for the sole purpose of obtaining such copy "in order that defendant may be advised of the nature of the alleged cause of action sued upon and may thereafter take such objections to the jurisdiction of this court as it may be advised." No copy of the complaint was served. When the time for the plaintiff to serve the same expired, defendant moved to dismiss the complaint under section 480, Code of Civil Procedure, which reads as follows:

"If the plaintiff's attorney fails to serve a copy of the complaint, as prescribed in the last section, the defendant may apply to the court for a dismissal of the complaint."

In the notice of motion, defendant's attorneys added to their former special appearance an appearance "for the purposes of this motion." The motion was denied on the ground that the defendant, having appeared specially, could attack only the jurisdiction of the court over its person. An appeal was taken by defendant to the Appellate Division from the order entered on said motion. In the notice of appeal, defendant's attorneys again attempted to extend their former special appearance by including therein the words, "for the purposes of this appeal." The order of the Special Term was reversed by a unanimous court without opinion, and the complaint was dismissed. From the judgment entered

thereon this appeal was taken, and again the attorneys for the defendant "appear specially for the purposes stated in the notice of appeal and no other" to support the judgment appealed from.

The theory of special appearances has been pushed by the defendant to an illogical extreme. A summons is served in order to bring the defendant under the authority of the court. Until jurisdiction has thus been obtained, no binding judgment can be entered. (*Davis v. Cleveland, C., C. & St. L. Ry. Co.*, 217 U. S. 157; *Big Vein Coal Co. v. Reed*, 229 U. S. 31.) When the summons has been served on a defendant who does not intend to submit himself to the jurisdiction of the court over his person, he may elect to remain out of court but he need not wait until the entry of judgment against him by default. He may appear specially. (*Goldey v. Morning News*, 156 U. S. 518; *Reed v. Chilson*, 142 N. Y. 152.) The special appearance is recognized only for the purpose of raising the question whether the court has obtained jurisdiction over the defendant personally or through his property. If the defendant serves a general notice of appearance, his right to assail the claim of jurisdiction over his person is waived. (Code Civ. Pro. § 421; *Reed v. Chilson*, *supra*.) If a motion to vacate the service of the summons on a special appearance is first made, the defendant may by answer iterate the plea to the jurisdiction. (*Toledo Rys. & Light Co. v. Hill*, 244 U. S. 49.)

The complaint reveals the merits of the action. To obtain a copy thereof, when it is not served with the summons, the defendant's attorney must "serve upon the plaintiff's attorney a written demand" which "may be incorporated into the notice of appearance." (Code Civ. Pro. § 479.) A mere demand for a copy of the complaint is not an appearance, either general or special. Defendant's general appearance can be made only in the manner indicated in section 421 of the Code (*Littauer*

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v. *Stern*, 177 N. Y. 233, 236; *Farmer v. Nat. Life Assn. of Hartford*, 138 N. Y. 265; disapproved in *Goldey v. Morning News*, 156 U. S. 518, 523; *Merchants Heat & Light Co. v. Clow & Sons*, 204 U. S. 286, 290), and its special appearance can be made only for the purposes hereinbefore indicated.

Recent decisions of the lower courts which recognize the right of a defendant to demand a copy of the complaint without appearing generally in the action interpret section 479 of the Code of Civil Procedure as if it introduced a deviation from the direct course of the law suit. The section is a part of one harmonious whole. By giving to a single sentence the effect of an innovation, this defendant has been allowed not only to demand a copy of the complaint, but to obtain a judgment of dismissal under section 480 without appearing generally. The course pursued by plaintiff's attorney was proper. The legal efficacy of the demand for the complaint contained in so-called special appearance was no greater than that of a personal request to be responded to as courtesy might dictate. Even if defendant was entitled to a copy of the complaint without a general appearance, it does not follow that it might also move to dismiss the complaint and appeal from an order denying its motion. No action can be taken on a special appearance that does not have for its basis a challenge to the jurisdiction of the court over the person or property of the defendant. No such challenge has as yet been interposed in this case, yet plaintiff is here with his complaint dismissed.

The judgment appealed from should be reversed and the order of the Special Term affirmed, with costs in this court and in the Appellate Division.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

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JOHN P. CLARK, Appellant, v. CAROLINA AND YADKIN
RIVER RAILWAY COMPANY, Respondent.

Contracts — construction and effect of letters constituting agreement to do certain work and fixing compensation therefor.

Plaintiff wrote defendant offering to do engineering work required by it "including supervision of construction, furnishing all plans and specifications and negotiations of contracts for six per cent of the completed work ending October 31st, 1914." Later he wrote that by his letter he meant that he would supervise the work and assume the same charges as before, "furnishing the same work, and also paying the expenses of certain employees * * * and after making a charge of six per cent on the total amount of construction, taking from that total of commissions the expenses of these various employees and a certain proportion of the office expenses." For a time, six per cent less expenses was paid plaintiff. Later, the defendant being dissatisfied, plaintiff wrote that it is understood under the agreement by which he was to receive six per cent on costs for engineering services that this charge should "not be more than \$6,000." *Held*, that plaintiff by the latter statement limited the balance payable to him after the expenses were deducted to \$6,000, and under this construction there was evidence supporting the plaintiff's claim of a balance due him.

Clark v. Carolina & Yadkin River Ry. Co., 175 App. Div. 894, reversed.

(Submitted January 30, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 2, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Theodor Megaarden for appellant. The trial court erred in its ruling on the construction of the agreement

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alleged in the first cause of action and in dismissing the complaint on the merits at the close of plaintiff's evidence. (*Richardson Press v. Vandergrift*, 165 App. Div. 180; *Fleischman v. Furgueson*, 223 N. Y. 235; *Fulmer v. Southern Ry. Co.*, 67 S. C. 262; *Lamb v. Norcross Bros. Co.*, 208 N. Y. 427; *S. I. Shipbuilding Co. v. Spearin*, 149 App. Div. 854; *Stevens v. Amsinck*, 149 App. Div. 220; *Wirth v. Kahlenberg*, 31 Misc. Rep. 803.) The trial court erred in excluding the evidence offered by plaintiff of what was said and done by the parties at the time payments were made by defendant to plaintiff under the agreement as modified alleged in plaintiff's first cause of action, the evidence being offered for the purpose of showing the construction placed by the parties themselves on the agreement, and particularly on the letter of January 2, 1914, which was construed by the court, and in construing the agreement as a matter of law, instead of admitting the evidence and submitting the case to the jury to determine, on all the evidence, the intention of the parties and the terms of the agreement. (*Woolsey v. Funke*, 121 N. Y. 87; *Nicoll v. Sands*, 131 N. Y. 19; *Sattler v. Hallock*, 160 N. Y. 291; *Seymour v. Warren*, 179 N. Y. 1; *Fox v. Coggeshall*, 95 App. Div. 410; *Genet v. Delaware, etc., Canal Co.*, 163 N. Y. 173; *Baldwin v. Feder*, 135 App. Div. 97; *Tanenbaum v. Levy*, 83 App. Div. 319; 178 N. Y. 594; *Lamb v. Norcross Bros. Co.*, 208 N. Y. 427; *Utica City Nat. Bank v. Gunn*, 222 N. Y. 204; *Trustees of East Hampton v. Vail*, 151 N. Y. 463; *First Nat. Bank v. Dana*, 79 N. Y. 108.)

Martin Conboy and *Philip S. Hill* for respondent. The court's construction of the agreement, which is the basis of the first cause of action, is correct. (13 Corpus Juris, 787, § 998; *Freeman v. Hedrington*, 204 Mass. 238; *Elliott v. Wanamaker*, 155 Penn. St. 67.) The evidence of what was said and done by the parties at the time

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of the payments, offered by the plaintiff for the purpose of showing the construction placed upon the agreement by the parties, was properly excluded. (*Giles v. Comstock*, 4 N. Y. 270.)

ANDREWS, J. The defendant, a railway corporation, was building a road in North Carolina. On November 3d, 1913, Mr. Clark in writing offered to do the engineering required by it "including supervision of construction, furnishing all plans and specifications and negotiations of contracts for six per cent of the completed work ending October 31st, 1914." Apparently this offer was not entirely satisfactory. The engineering department of the railway seems to have maintained an office at High Point which was in part used for the benefit of other corporations. Mr. Clark had previously been employed by it under some arrangement which does not fully appear. With this in mind, its president, Mr. Coler, spoke of the expenses of this office which had not been mentioned in the offer. Under the prior contract of employment evidently some allowance had been made for these expenses. Mr. Clark replied that by his letter he meant that he would supervise the work and assume the same charges as before, "furnishing the same work, that I had been doing, and also paying the expenses of certain employees at High Point, who were assisting in that work, the same expenses that had been paid by the engineering department before that time; to continue that arrangement and after making a charge of six per cent on the construction, total amount of construction, taking from that total of commissions the expenses of these various employees and a certain proportion of the office expenses." This offer was accepted.

There can be little doubt as to what was intended. Mr. Clark was to do certain work, furnishing necessary plans at his own expense. As compensation he was to

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receive six per cent of the cost price of the completed work, less a part of the wages of certain employees and certain office expense of the railroad company. These were to be taken by the defendant from the six per cent and the balance paid to the plaintiff. The position taken by both parties equally upon this trial shows that this was their understanding. The records of these expenses were kept by the railroad company. Not six per cent but six per cent less the expenses was paid to Mr. Clark. The allegation of payment in the answer is based upon the proposition that the latter had received all that he was entitled to, because such a payment has been made.

Under this contract work was done in November, 1913. The defendant became dissatisfied and Mr. Coler told the plaintiff that he thought the latter "would receive too much pay." He asked what Mr. Clark thought he would *receive* up to the completion of a portion of the work. Mr. Clark replied that he thought he would *receive* about \$6,000 in all. Mr. Coler then asked him if he would place a limit to the amount he would *receive* and Mr. Clark replied that he "would put a limit of \$6,000 as to the amount that he should receive" during that time. Later, apparently so that this agreement might be upon record, Mr. Clark wrote Mr. Coler. It is understood that "under the agreement by which I receive six per cent on costs for engineering services that this charge from December 1st, 1913, until completion of the High Point Terminal shall not be more than \$6,000."

The proper interpretation of this amendment of the original contract which the plaintiff in its complaint concedes to have been made is decisive upon this appeal. If, as the respondent claims, the plaintiff was entitled under it to receive at the most \$6,000, less what the railroad company might properly expend upon the office, then the trial court was right in dismissing the complaint

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at the close of the plaintiff's case. The defendant in that event had paid him all that was due him. If, on the contrary, Mr. Clark by this amendment simply limited the balance payable to him after the expenses were deducted to \$6,000, then the dismissal was erroneous. Under that construction there was evidence in the case supporting the plaintiff's claim of a balance due him, for under this construction of the amended contract it should be observed that the burden of proof was upon the defendant to show the amount which might be deducted from the six per cent which Mr. Clark would otherwise receive.

The amended contract was at least ambiguous. It was, therefore, error on the part of the trial court to exclude evidence showing the practical construction put upon it by the parties between themselves.

Under all the circumstances, however, interpreting the original contract as we do, we think that the construction given to the amended contract by Mr. Clark is right as matter of law. It is true the evidence before us is not as complete as might be desired. At times we are required to draw inferences when the facts might have been proved. Upon a new trial, in view of additional testimony, a different result may be reached. But here, the plaintiff's version of the transaction is uncontradicted. Mr. Coler did not complain of the office expenses which were under the control of the railroad company. He feared Mr. Clark might receive an excessive amount for his services. This is what the latter referred to in his answer. As to this amount the limit was fixed. Nor does the letter which has been quoted contradict or vary this version. It too has to do with the amount to be received by Mr. Clark. "This charge," which it speaks of, is the charge for Mr. Clark's services.

The trial court erred in excluding the plaintiff's letter

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of November 3, 1913, regarding a second contract for his employment as manager of the defendant.

The judgments of the courts below should be reversed and a new trial ordered, with costs to abide the event.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO and POUND, JJ., concur; CRANE, J., not voting.

Judgments reversed, etc.

CONCETTA SAGONE, as Administratrix of the Estate of GIACOMO SAGONE, Deceased, Respondent, v. DAVID C. MACKEY, Appellant.

Principal and agent — when agent of surety company who received moneys for company not liable for such moneys which the company refused to pay after the agency had terminated.

Defendant, who was agent for a surety company, by the consent of his principal deposited moneys received by him for his principal in a bank account which stood in the name of himself and a former partner, then dead, as managers, transmitting such moneys to his principal, usually at the end of the month. Plaintiff placed in the hands of the defendant the moneys, to recover which this action was brought, in order to secure such principal for its obligations upon a bond given by it on plaintiff's behalf, as an administratrix, such moneys passing into the bank account of defendant and there was no understanding or arrangement that the identical fund was to be preserved intact or that it was to be placed in a special account. The defendant's principal refused to repay these moneys to plaintiff after defendant's agency had terminated and this action was brought against defendant to recover them in conversion. *Held*, upon examination of the evidence that the facts are not sufficient to sustain a judgment for plaintiff.

Sagone v. Mackey, 172 App. Div. 192, reversed.

(Argued January 30, 1919; decided February 25, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 20, 1916, which reversed a determination of the Appellate Term reversing a judgment

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of the Municipal Court of the city of New York in favor of plaintiff and granting a new trial and affirmed said judgment.

The nature of the action and the facts, so far as material, are stated in the opinion.

John Ewen for appellant. The defendant received the money in question as agent for a disclosed principal while acting within the scope of his authority, and the principal alone is liable for its return. (*Austin v. Rawdon*, 44 N. Y. 63; *Colvin v. Holbrook*, 2 N. Y. 126; *Matter of Flaherty v. Milliken*, 193 N. Y. 564; *Costigan v. Newland*, 12 Barb. 456; *Cooper v. Tim*, 16 Misc. Rep. 372; *Hall v. Lauderdale*, 46 N. Y. 70; *Fisher v. Meeker*, 118 App. Div. 452; *Cohen v. Barry*, 108 N. Y. Supp. 574; *Manley v. Stayner*, 20 J. & S. 537; *Iserman v. Conklin*, 21 Misc. Rep. 194; *Middleworth v. Blackwell*, 85 App. Div. 613; *Finnegan v. Geoghegan*, 111 N. Y. Supp. 656; *Levine v. Field*, 114 N. Y. Supp. 819; *Breid v. McVickar*, 31 Misc. Rep. 793.) The deposit of trust funds by a fiduciary in his individual account is not a conversion thereof. (*Bischoff v. Yorkville Bank*, 218 N. Y. 106; *Matter of Barnes*, 140 N. Y. 468; *Duffy v. Duncan*, 32 Barb. 587.) No cause of action for conversion was proven. (*Matter of Barnes*, 140 N. Y. 468; *Jones v. Gould*, 123 App. Div. 236; *Hall v. Lauderdale*, 46 N. Y. 70; *National Park Bank v. Seaboard Bank*, 44 Hun, 49; *Mowatt v. McLellan*, 1 Wend. 173; *LaFarge v. Kneeland*, 7 Cow. 456; *Ledwith v. Merritt*, 74 App. Div. 64; 174 N. Y. 512; *Van Alen v. Am. Nat. Bank*, 52 N. Y. 1.)

Samuel F. Frank for respondent. Mackey received into his possession plaintiff's money "to be held for further deposit" for her in some depository, subject only to the surety company's "joint control." Until such "further deposit" Mackey was personally the

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depository and a fiduciary of the fund in question. (*Bischoff v. Yorkville Bank*, 218 N. Y. 112; *People ex rel. Zotti v. Flynn*, 135 App. Div. 276; *Morris v. Windsor Trust Co.*, 213 N. Y. 27; *People v. City Bank*, 96 N. Y. 32; *Strauss v. Tradesmen's Bank*, 122 N. Y. 379; *Britton v. Ferrin*, 171 N. Y. 235.) By using up all the funds in that account for his own personal uses, Mackey consumed and misappropriated plaintiff's fund so identified. (*Smith v. Hall*, 67 N. Y. 51.) Title to the fund did not pass to the surety company immediately upon Mackey's receipt thereof, because it was not money he had collected for the surety company or to be paid over to the surety company. It was a fund which was the property of the plaintiff, always retaining its trust character, which neither Mackey nor his principal could take; all either of them could do was "to hold" it for the plaintiff. It is, therefore, immaterial whether Mackey was the agent of the surety company, or that he came into possession of the fund by reason of that fact. Being in possession of it, knowing it was not the money of the surety company, but of the plaintiff, and being "held" for her, he used up the fund thus representing her property. (*Colvin v. Holbrook*, 2 N. Y. 126; *Waterbury v. Westervelt*, 9 N. Y. 604; *Fisher v. Meeker*, 118 App. Div. 454.)

HISCOCK, Ch. J. This action is brought for conversion of certain funds. At the time of the occurrences involved the defendant was the agent in New York city of the Illinois Surety Company, a foreign corporation engaged in the business, amongst other things, of furnishing bonds for administrators and guardians. The fact that the surety company was the principal acting through defendant as its agent was amply advertised and made fully apparent. As such agent the defendant was accustomed in behalf of his principal and in its name to collect pre-

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miums and receive moneys deposited with it as indemnity against liability on bonds which it issued for various people. By the full and express consent of the principal, as established both by uncontradicted evidence and by offers of proof which were rejected and, therefore, must be considered in behalf of defendant upon this appeal, the defendant deposited moneys thus collected and received for and on behalf of his principal in a bank account which stood in the name of himself and a former partner, then dead, as managers. From this account he was authorized to draw for his own benefit the amount allowed for his commissions and from which he was required to pay the expenses of the agency. Apparently from moneys which came to him there was sometimes retained without deposit sufficient cash with which to meet petty items of office expense. The balance of the amounts collected in behalf of his principal by defendant for premiums over and above the sum which he was entitled to draw and use as aforesaid, was remitted to his principal usually at the end of each month. Sums received by it through him as indemnity against liability as above stated were sometimes remitted to the surety company without being deposited in the foregoing account, as we understand the evidence, and sometimes they were not.

The plaintiff procured the surety company through defendant to issue a bond for her as administratrix and when as such she collected \$1,500, such sum was delivered to the defendant, less between five and six hundred dollars retained by her as her individual share of the amount thus collected. At the time this amount was thus brought to the defendant it was understood and expected that the plaintiff was to procure herself to be appointed general guardian for two children to whom belonged the balance of the fund, and that then a bond was to be furnished for her as such general guardian and the amount left with

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defendant deposited in a special account in a specified bank, and plaintiff subsequently came to defendant's office to perfect such arrangement. When, however, upon her request the money left with the defendant was produced to her she changed her plans and the money was left with defendant pending some arrangement to be made for transmitting the same to Italy without the appointment of herself as such guardian as aforesaid. This balance of about \$900 which was thus offered to her and which she decided not to take was left in a general way with defendant pending some indefinite arrangement to be made in the future and there was no understanding or arrangement that the identical fund was to be preserved intact or that it was even to be placed in a special account. As a matter of fact it is assumed and we think must be that it was passed into the account maintained by the defendant as agent, to which we have referred.

In all of these transactions the evidence shows conclusively and beyond question or debate that the plaintiff was dealing with the Illinois Surety Company through defendant as its agent and that he was not in any sense acting as principal.

The occurrences last detailed took place on August 25th and in the following December defendant's agency for the surety company was terminated, and apparently this was done under such circumstances of dissatisfaction and friction that the surety company refused to repay to the plaintiff the moneys thus left with its agent and has been potential in procuring this litigation to be started against the latter to recover in conversion for the moneys left with him as aforesaid. We search in vain for any facts upon which there may be founded a judgment against him for such conversion.

We shall pass the proposition which certainly may be argued with much force that the final arrangement under which plaintiff left her moneys with defendant was

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that of a simple deposit creating the ordinary relation of creditor and debtor and assume that the surety company held them in a fiduciary capacity. Even so, in the absence of some special agreement it was not compelled to hold the identical moneys or even to deposit them in a special account. It had the right to deposit them in a general account with other moneys. This method was doubtless subject to certain risks, but it did not amount to a conversion. (*Matter of Barnes*, 140 N. Y. 468; *Bischoff v. Yorkville Bank*, 218 N. Y. 106.) And of course a different aspect was not given to these acts because the surety company permitted these moneys temporarily to be deposited in an account maintained for it by and in the name of its agent. Furthermore, it is obvious that an agent would not ordinarily become personally liable for conversion to a third person because in behalf of his principal he performed acts and carried out a course of dealing which it was lawful for the principal to perform and carry out. If the principal would not become liable for conversion because of the deposit of fiduciary moneys in a general account, certainly under ordinary circumstances the agent through whom this deposit was made and in whose name the account was kept would not become personally liable in the place of the principal.

It is, however, claimed, so far as we are able to understand it, that the defendant has been guilty of conversion because he has exceeded his authority and used for his personal benefit the moneys which were received from plaintiff. It being permissible for the surety company to deposit the funds received from plaintiff in the general account without being guilty of conversion, I think it is at least debatable whether the company would have become guilty of conversion if it had used the balance in such account for its business uses so long as it retained in some other account sufficient funds with

which to meet its obligations. If it could have used the balance in such account for the purpose of meeting its business engagements with defendant without being guilty of conversion, the defendant himself would not have been guilty of conversion because he received or used the balance in the account in a manner authorized by the surety company.

Assuming, however, that the defendant would have been guilty of conversion if he had used in his business as authorized by his principal the balance in the account kept by him as agent, including the deposit of the moneys of the plaintiff, there is no intelligible evidence that he did any such thing. Plaintiff's moneys were finally left with the surety company on August 25th, but for some reason they do not seem to have been deposited in the account kept by the defendant until September 30th. There is no evidence that defendant drew from this account for his own uses except to the amount due to him for commissions and there is no evidence that his drafts for such purpose ever reduced the account below a sum which would leave it good for the amount due the plaintiff. The general custom was that each month after the defendant had drawn the amount due to him for commissions, a statement and remittance covering the balance in the account was sent to the surety company. There is some indefinite evidence that sometimes defendant remitted to the surety company sums left with him as agent as against bonds which had been issued and that sometimes he did not. As already stated we interpret the rather loose evidence on this subject as meaning that sometimes special remittances were made to the surety company for such deposits and do not regard it as contradicting the other evidence which was given by the same witness, that the custom was to remit each month the balance of the general account kept by defendant after withdrawing the sums to which he was entitled for

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commissions. There is no evidence to rebut this testimony in respect of the general custom followed by the defendant in dealings with his principal or to show that in making these remittances there was excepted and retained in his possession the moneys left with him by plaintiff. It is true that there is evidence that when he left the employ of the surety company in December there was a balance in the account of about \$11,000, but it appeared by other testimony which has been assumed to be reasonable and truthful, although given by the defendant, that subsequently and before the commencement of this action he paid to the surety company an amount equal to this balance. Independent of this latter evidence however, there is nothing to show that this balance was not created by sums deposited in the account subsequent to the date when the moneys belonging to plaintiff were deposited and that the remittances made by the defendant to his principal did not exhaust all balance in the account in favor of the principal down to and including the sum belonging to plaintiff deposited in said account. If defendant has remitted to his principal these moneys he received and held for it he certainly is not subject under the circumstances of this case to a claim of conversion.

If plaintiff was to succeed in charging defendant with conversion of moneys paid knowingly and undoubtedly to him as agent for a known principal on the theory that he had retained these moneys and used them in an unauthorized manner for his personal benefit, that theory ought to have been sustained by reasonably clear and definite testimony and such testimony we do not find in the record before us.

Therefore, I conclude that the views of the Appellate Term were right and that the judgment of the Appellate Division should be reversed and the determination of the Appellate Term affirmed, with costs in this court and the Appellate Division to appellant to abide event, the date

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of a new trial to be fixed by the Appellate Term in case the parties are unable to agree.

COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Judgment reversed, etc.

ISRAEL T. DEYO et al., Respondents, *v.* CHARLES I. HUDSON et al., as Copartners under the Firm Name of C. I. HUDSON & Co., Appellants.

Unanimous decision of Appellate Division after special verdict — remedial liability — principal and agent — fraud and deceit — false promise made with intent to break same — action by members of law firm to recover money embezzled by their junior partner and lost in stock speculations, on margins, in a branch office of defendants conducted and managed by their agent — when defendants not bound by false statements and by acts of their agent in concealing speculations of the junior partner — when evidence insufficient to show authority of defendants' agent in acts complained of or that acts were ratified by defendants — proximate cause — deceit followed by negligence not the immediate cause of loss.

1. When a defendant's motion for a nonsuit is granted after a special verdict in favor of plaintiff and the Appellate Division unanimously reverses the judgment entered thereon and grants judgment on the special findings of the jury, the reversal of the judgment is reviewed in this court on the evidence and not on the special findings. The power of the Court of Appeals to review on the evidence is not defeated even by the unanimous decision where the exceptions to rulings on evidence and to the charge of the court sufficiently present the question whether the special verdict rests on a foundation of legal error.

2. A promise made for the pecuniary advantage of the promisor, with the present intention to break it, may be deemed to be the false statement of a material existing fact because it falsely represents the state of promisor's mind and the state of his mind is a fact. Remedial liability may arise from such an unqualified falsehood when loss results therefrom.

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3. Where a principal, in ignorance of his agent's wholly collateral fraud, retains what appears to be the legitimate proceeds of a transaction, that is not enough to bind him as by a ratification. If a principal authorizes his agent to make a sale and the agent, on his own responsibility, aids a buyer in embezzling the purchase money or in swindling some one out of it, the mere receipt and retention of the money by the principal in ignorance of such wrongful acts may not bind him to repay the proceeds of the theft.

4. The plaintiffs are a law firm practicing in a city in which the defendants, stockbrokers, have a branch office in charge of an agent as manager. A junior member of this law firm opened an account in defendants' branch office and speculated on margins, losing money belonging to the plaintiffs and their clients. He confessed to the senior member of his firm and his peculations were made good. After that the senior member of plaintiffs' firm interviewed the manager of the defendants' branch office and told him that they were considering retaining the junior partner in their firm but would not if he continued to speculate in defendants' office, and asked defendants' agent to let them know if the junior partner came back to do any more trading, which defendants' manager promised to do. Thereafter the manager not only failed to inform the plaintiffs that the junior partner was trading in defendants' office but effectively aided him in concealing the fact, and on one occasion positively assured the senior partner of plaintiffs that the junior partner had not resumed trading. Plaintiffs sue to recover from defendants the loss that they have sustained by the junior partner's defalcations. Upon examination of the record it appears that there is no evidence that defendants authorized their agent to make false representations to plaintiffs or that he was held out as having such authority, or that it was within the scope of his employment, and there is no evidence that, by subsequent words or conduct, the defendants ratified his acts.

5. The bounds of legal liability are the reasonable and probable consequences of a breach of duty. If the broken false promise of a stockbroker's agent to give a law firm notice if a member of such firm, previously dishonest through stock speculation, resumes trading with the branch office where he lost the money he embezzled may be regarded as the act of the principals, the principals are not liable when the proximate cause of future stealings by such partner from the firm clients is the subsequent negligence of the law firm in failing to exercise reasonable care to prevent further defalcations.

Deyo v. Hudson, 174 App. Div. 746, reversed.

(Argued February 3, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered December 6, 1916, upon an order of the Appellate Division of the Supreme Court in the third judicial department, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term after certain questions had been specially submitted to the jury and directing judgment in favor of plaintiffs on the answers thereto.

The nature of the action and the facts, so far as material, are stated in the opinion.

Nathan L. Miller and John Godfrey Saxe for appellants. Carver's thefts were the proximate cause of plaintiffs' liability to its clients. (*Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; *Laidlaw v. Sage*, 158 N. Y. 73; *Hall v. N. Y. Telephone Co.*, 214 N. Y. 49; *Jex v. Straus*, 122 N. Y. 293; *Hoffman v. King*, 160 N. Y. 618; *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y. 209.) The plaintiffs were a contributing cause of their own losses in their deliberate action in failing to disclose Carver's embezzlements to Mitchell or the defendants. (*Dezell v. Odell*, 3 Hill, 215; *Armour v. Michigan Central R. R. Co.*, 65 N. Y. 111; *Royce v. Watrous*, 73 N. Y. 597; *Trustees v. Smith*, 118 N. Y. 634; *Mattes v. Frankel*, 157 N. Y. 603; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *U. S. Life Insurance Co. v. Salmon*, 157 N. Y. 682; 91 Hun, 535; *Damon v. Surety Co.*, 161 App. Div. 875; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201; *Albany City Savings Inst. v. Burdick*, 87 N. Y. 40; *Wilcox v. Am. Tel. Co.*, 176 N. Y. 115.) The plaintiffs, as a matter of law, had no right to rely on anything Mitchell said; and there is no legal evidence that they did so rely. (*Kinthead's Law of Torts*, § 725; *Cowen v. Simpson*, 1 Espinasse, 290; *Starr v. Bennett*, 5 Hill, 303; *Dambmann v. Schulting*, 75 N. Y. 55; *Zagarino v. Kurzrok*, 135 App. Div. 763; *Creamer v. Peshkin*, 81 Misc. Rep. 167; *Sanborn v. Lefferts*, 58 N. Y. 179; *Auspacher v. Pfeiffer*, 13

N. Y. Supp. 418; *Martin v. Clark*, 19 App. Div. 496.) Mitchell was not guilty of actionable deceit; nor are defendants responsible for his actions in dealing with a stranger. (*Reed v. Clark C. G. Co.*, 47 Hun, 410; *Gallager v. Brunel*, 6 Cow. 346; *Gray v. Palmer*, 2 Robt. 500; 41 N. Y. 620; *Lexow v. Julian*, 21 Hun, 577; 86 N. Y. 638; *Taylor v. Commercial Bank*, 174 N. Y. 181; 175 N. Y. 464; 68 App. Div. 458; *Wilson v. Meyer*, 154 App. Div. 300, 302; *Field v. Seibert Bearing Co.*, 179 App. Div. 780; *Dambmann v. Shulting*, 75 N. Y. 55; *American Credit Co. v. Wimpfheimer*, 14 App. Div. 498; *Zagarino v. Kurzrok*, 135 App. Div. 763.)

Harvey D. Hinman for respondents. The unanimous decision of the Appellate Division precludes the defendants from raising in this court any question based upon the sufficiency of the evidence to sustain the verdict. (Code Civ. Pro. § 191, subd. 3; *Szuchy v. Hillside C. & I. Co.*, 150 N. Y. 219; *People ex rel. Manhattan R. Co. v. Barker*, 152 N. Y. 417; *Meserole v. Hoyt*, 161 N. Y. 59; *City of Niagara Falls v. N. Y. C. & H. R. R. Co.*, 168 N. Y. 610; *Marden v. Dorothy*, 160 N. Y. 39; *Reed v. McCord*, 160 N. Y. 330; *Cronin v. Lord*, 161 N. Y. 90; *Kennedy v. Mineola H. & F. Traction Co.*, 178 N. Y. 508; *Le Gendre v. Scottish U. & N. Ins. Co.*, 183 N. Y. 392; *Tyndall v. N. Y. C. & H. R. R. Co.*, 213 N. Y. 691.) The retention of Carver by plaintiffs in their firm was the proximate cause of the loss and damage which the plaintiffs sustained and the defendants are liable for such damage because it was through their misrepresentations that Carver was retained in the firm. (*Ehrgott v. Mayor*, 96 N. Y. 264; *M. & S. P. Co. v. Kellogg*, 94 U. S. 469; *Bird v. St. Paul F. & M. Ins. Co.*, 224 N. Y. 47; *Ehrgott v. Mayor, etc.*, 96 N. Y. 264, 282; *Guille v. Swan*, 19 Johns. 381; *Gibney v. State*, 137 N. Y. 1; *Sharon v. Mosher*, 17 Barb. 518; *Vandenburg v.*

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Truax, 4 Denio, 464.) Mitchell's declaration to Deyo that he would inform Deyo in case Carver came back to trade in defendants' office, was not only a promise, it was a misrepresentation as well. (*Ottinger v. Bennett*, 144 App. Div. 525.) The plaintiffs had the right to rely on what Mitchell said, and the defendants are responsible for Mitchell's misrepresentations, because Mitchell in making such misrepresentations was acting within the scope of his authority. (*Green v. Des Garets*, 210 N. Y. 79; *Krumm v. Beach*, 96 N. Y. 398; *Fishkill Savings Inst. v. National Bank*, 80 N. Y. 162; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30.)

POUND, J. This is an action to recover damages for deceit. Many of the material facts are in dispute and plaintiffs' version alone is stated. The plaintiffs, with William B. Carver, were law partners in Binghamton. Defendants are stockbrokers. Their principal office is at No. 36 Wall st., New York, but they have branch offices in Binghamton and other cities. Their business is extensive. They have memberships in the New York Stock Exchange and other desirable connections. The law firm looked after estate matters and trust funds and attended to investments for clients. Many securities were intrusted to them on which they collected the interest, received payments of principal and made reinvestments. In August, 1910, Carver confessed to Deyo that he had, since the preceding March, been speculating on margins in the stock market through defendants' Binghamton office and had stolen and lost more than \$20,000 of their clients' money. Carver had a high standing in the community and passed as eminently respectable. He then closed his account with defendants and his speculations were made good. Plaintiffs had to decide what to do with him. To drop him from the firm might cause a scandal and their feeling toward him seems to have been sorrow

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rather than indignation. Deyo in this connection, about November 1, 1910, interviewed Mitchell, the manager of defendants' Binghamton office. Mitchell regarded Carver as a good customer, one of a chosen dozen about there, and had in March written to his firm that: "Our new customer, W. B. Carver, will make a good trader and pay big commissions if he gets away right; he expressed great faith in Mr. Hudson's opinion; have looked him up and find that his father left him a lot of money, and that he has a large law practice."

Deyo testified that "I said to Mr. Mitchell that 'my junior partner has been speculating here in your office; he has lost every dollar he had; he has stripped himself completely; he has lost what he had over here. As a member of our firm he has to do with a great many trust funds; we are handling a great deal of money and securities for clients, *and our clients would not trust us, and very properly, if they understood that any member of our firm, or any man connected with the office was engaged in that line of business;* and that Col. Hitchcock and myself are considering the matter of retaining him in the firm; we will not retain him in the firm or permit him to be connected with the office if he engages in that sort of business.' I said to him that *Carver had promised that he would not, which was true.* I told him that Carver was a valuable man in some ways in the office; that he was a very accurate man and very painstaking man and that he could earn a living there, but I didn't know where he could earn a living elsewhere. And that question was up, that Col. Hitchcock and I were discussing as to whether we should retain him in the firm or not, and said, 'What I want you to do, I want you to let me know if he comes back here to do any more trading on your board.' In speaking about handling trust funds or funds belonging to estates, Mitchell replied, 'Oh, that is all right,' He said 'We never take on a customer on a

marginal account who occupies a trust position like, he said, 'a bank clerk,' and he used the expression, 'insurance clerk,' and I said, 'Yes, that is the case exactly; we are handling a large amount of trust funds and moneys belonging to other people,' and my recollection is, although I would not testify to it positively, that I also told him in that connection that he had not only stripped himself of everything he had, but that he had also lost everything that his wife had, what little she had. When I said to him that he has lost everything he has got, he said, 'I am surprised; I supposed he was a very wealthy man, and his father was a rich man and he was very wealthy.' I said, 'No, Mr. D. H. Carver was not a wealthy man and he left practically little to Will, but whatever he had is gone; he has lost it over here, and *I want you to let me know if he comes back here to do any more trading in your office,*' and he replied that he would do so. And that was the substance of our conversation. * * *

I told him that when we discovered it that we had concluded to notify Carver that he could not remain in the firm or connected with the firm in any capacity whatever; but that *he had promised that he was through with that, and we were reconsidering the matter of retaining him in the firm."*

At that time Mitchell knew that Carver had reopened his account with the defendants in a small way. When he gave Deyo assurances that he would report any further trading by Carver he misstated his existing intention. He did not intend to tell Deyo anything on the subject. Deyo listened with credulity and the plaintiffs decided to keep Carver in the firm. On November 26, 1912, Carver disappeared. Then it was found that he had resumed both his peculations and his speculations and had appropriated securities belonging to clients of his firm and cash received by the firm for clients, amounting to more than \$50,000. He had with money thus obtained purchased and sold through the defendants on margins,

stocks of the aggregate value of nearly \$10,000,000, cotton in the aggregate value of more than \$1,000,000 and grain of the aggregate value of about \$800,000. Defendants' commissions on these transactions were about \$11,000. Mitchell had not only failed to inform Deyo that Carver had resumed trading in defendants' office but had effectively aided Carver in concealing the fact, explaining in a letter to his principals that "his [Carver's] law partner is a strict church man and *does not believe in gambling*. This is a small town and accounts must be kept very quiet." He also took payments from Carver in currency instead of checks and on one occasion positively assured Deyo that Carver had *not* resumed trading.

Plaintiffs sue to recover from defendants the loss that they have sustained by Carver's defalcations. Upon the trial the court reserved its ruling upon the defendants' motion for a nonsuit, and submitted special questions to the jury. The first question was as follows: "Did the defendants or defendants' employees, while acting within the scope of their employment, knowingly make to the plaintiffs false statements or misrepresentations as to existing facts, or knowingly conceal existing facts which the defendants or such employees ought, under the circumstances, to have disclosed to the plaintiffs; and if so, were the same made and done with the intention that the plaintiffs should rely thereon; and did the plaintiffs rely on such false statements, misrepresentations or concealments in continuing the law partnership of Deyo, Hitchcock & Carver with William B. Carver as a member; and were injury and damage to the plaintiffs the natural and probable results of such false statements, misrepresentations or concealments; and were such injury and damages received by the plaintiffs?" The jury answered this question in the affirmative. Other questions, seven in number, related to the amount of

damages growing out of the misappropriation of the funds of each client whose money had been taken and were also answered by the jury in plaintiffs' favor. The court thereafter granted the defendants' motion for a nonsuit and directed the entry of judgment against the plaintiffs for the dismissal of the complaint and the costs of the action. An appeal was taken to the Appellate Division, where an order was unanimously made, *first*, reversing the judgment appealed from and *secondly*, directing judgment on the special verdict in favor of plaintiffs. On such order judgment was entered in the sum of \$67,462.45, from which defendants appeal.

In reviewing the order of the Appellate Division reversing the judgment of the trial court, although we have a unanimous decision that there is evidence supporting the special verdict, this court will consider the evidence and will not confine itself to the findings of the jury. The Constitution (Art. 6, sec. 9) in effect January 1, 1895, provides that, "No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals." The provisions of the Code (§ 1187) for nonsuit after special verdict were added by chapter 946, Laws of 1895, in effect January 1, 1896, and were not in the minds of the members of the Constitutional Convention when the unanimous decision rule was formulated. They now read as follows: "When a motion is made to nonsuit the plaintiffs or for the direction of a verdict, the court may, pending the decision of such motion, submit any question of fact raised by the pleadings to the jury or require the jury to assess the damage. After the jury shall have rendered a special verdict upon such submission or shall have assessed the damage, the court may then pass upon the motion to nonsuit or direct such general verdict as either party may be entitled to. On

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an appeal from the judgment entered upon such nonsuit or general verdict, such special verdict, or general verdict, shall form a part of the record, and the appellate division or the court of appeals may direct such judgment thereon as either party may be entitled to."

When defendants' motion for a nonsuit is granted after verdict, and the Appellate Division unanimously reverses the judgment entered thereon and grants judgment on the special findings of the jury, the reversal of the judgment is reviewed in this court on the evidence and not on the special findings. The special verdict is in suspense until it is instated by the Appellate Division. The unanimous decision that there is evidence to support the verdict is not reviewed until the order of reversal has been first considered. Then the findings of fact may, if the reversal is upheld, be reviewed for the purpose of determining whether the judgment directed thereon is proper. The practice is different where a general verdict is rendered, set aside by the trial court and reinstated by the Appellate Division. Furthermore, this court's power of review would not be defeated in this appeal if we were to apply the unanimous decision rule to the judgment of reversal. Exceptions to rulings on evidence and to the charge of the court sufficiently present the question whether the special verdict rests on a foundation of legal error. (Cardozo on The Jurisdiction of the Court of Appeals, § 68.)

We turn, therefore, to a consideration of the case on the merits. Remedial liability depends upon the existence of a legal duty, binding upon the defendant and unfulfilled by him. Judged by their obliquity, the things men do may be regarded by their fellow men as sins or vices, but the civil law considers only whether they are actionable. The bounds even of legal liability are the reasonable and probable consequences of a breach of duty. (*Bird v. St. Paul F. & M. Ins. Co.*, 224 N. Y. 47.)

Plaintiffs contend that their loss was due to Mitchell's

fraudulent misrepresentation to them of his existing intent to conceal the fact if Carver again became a customer of the Binghamton house, when he knew that his intent was the contrary and that plaintiffs were relying and acting upon his promises. Such false statement may be deemed the statement of a material existing fact, because it falsely represents the state of Mitchell's mind and the state of his mind is a fact. (*Adams v. Gillig*, 199 N. Y. 314; *Ritzwoller v. Lurie*, 225 N. Y. 464.) They further contend that such misrepresentations and the accompanying and subsequent concealment by Mitchell of Carver's relation with defendants proximately led to Carver's retention in plaintiffs' firm, his opportunities to steal and his stealing; that prudent foresight would have revealed to Mitchell, when he made his false promises, that if Carver came back to him it would be with other people's money; that this deceit was the efficient cause which set all other causes in motion to plaintiffs' undoing; that it accomplished what Mitchell intended to accomplish; that he thus kept in his toils for a period of two years the good customer who would pay big commissions who would otherwise be driven away; that the business was thus retained and profits made therefrom; that defendants may not now disclaim responsibility for Mitchell's fraud. (*Green v. des Garets*, 210 N. Y. 79.)

The first question to determine is whether Mitchell and Deyo entered into legal relations. The inference is permissible that Mitchell uttered an unqualified falsehood when he said that he would notify Deyo if Carver resumed trading with the defendants; he uttered it with a fraudulent intent and plaintiffs acted thereon. If injury resulted, with which defendants may be charged, the action can be maintained. (*Rice v. Manley*, 66 N. Y. 82; *Adams v. Gillig*, *supra*; *Ritzwoller v. Lurie*, *supra*.)

The next question to determine is whether defendants are legally responsible as principals for the instrumentality

employed by their agent Mitchell to retain Carver as a customer. *First*, did they authorize his misrepresentations by antecedent words or conduct? Were such misrepresentations within the scope of his employment? Mitchell's general instructions were "just to get the money" without any instructions to ascertain where it came from. His duty was to conceal rather than disclose the names of customers. He had no authority from his firm to reveal them to the inquisitive. Doubtless he would have subjected himself to censure had he done so. His legal duty did not require him to warn those who might be benefited by the knowledge that a partner, clerk or relative was losing heavily. Whatever moral obligation might exist, mere silence was not actionable. He was authorized to go to extremes and did — apart from the promise to Deyo — go to extremes in keeping from the knowledge of plaintiffs the facts that might lead to the closing of a profitable account. He was aided by his principals in keeping promises of secrecy made by him to Carver. That he was authorized in this connection to lie to the business and family connections of the patrons of his branch office is an inference without support in the evidence. The evidence reveals no such custom. The law implies none. His general authority to retain customers and conceal customers; his duty to retain them and keep confidential their dealings, did not imply authority to make false representations to Deyo that he would disclose to him any future operations on the part of Carver. He was not held out as having such authority. Such representations were not reasonably or necessarily incidental to what he was authorized to do.

Deyo was chargeable with notice of the nature and extent of Mitchell's powers. He knew that Mitchell had no interest in the reputation of the law firm. He was bound to know the rule that requires one in dealing with an agent to ascertain the limits of his authority. Defend-

ants had no knowledge that such representations had been made. They were not made in defendants' name. Plaintiffs, having relied upon them without inquiry, may not transfer their loss to defendants without showing that defendants have assumed responsibility therefor.

Secondly, did defendants, by their subsequent words and conduct, ratify the acts of their agent? It is urged that they have retained their commissions and have thereby taken advantage of a collateral fraud perpetrated without their authority and never knowingly assented to by them; perpetrated not for the purpose of making a sale but merely for the purpose of preventing outside interference with a customer and that they are thus made answerable for the remotest consequences of the fraud. The rule which makes the receipt and retention of the fruits of an agent's fraud involve an innocent principal in liability on account of it (*Krumm v. Beach*, 96 N. Y. 398) is not unqualified. It has been said that such a ruling applied to collateral *contracts* would be subversive of well-settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys and others, clothed with limited powers and occupying strictly fiduciary relations. (*Smith v. Tracy*, 36 N. Y. 79, 85; *Baldwin v. Burrows*, 47 N. Y. 199.) A principal, in ignorance of the agent's fraud, retains what appears to be the legitimate proceeds of a transaction. That is not enough to bind him as by a ratification. If a principal authorizes his agent to make a sale and the agent, wholly on his own responsibility, aids a buyer in embezzling the purchase money or in swindling some one out of it, the mere receipt and retention of the money by the principal in ignorance of such wrongful acts may not bind him to repay the proceeds of the theft. (*Wheeler v. Northwestern Sleigh Co.*, 39 Fed. Rep. 347, 351; *Foote v. Cotting*, 195 Mass. 55, 61; 15 L. R. A. [N. S.] 693.) We would be carrying remedial liability beyond the logic of any reported case if we charged

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the defendants with responsibility for Mitchell's false promise. The peculiar doctrines of agency are not to be extended beyond the limitations of common sense.

The distinction is not, however, always readily recognized and expressed between frauds of the agent which bind the principal and those which do not. "A party dealing with an agent is bound to inquire as to the extent of his authority; but he cannot always protect himself against his frauds." (*Baldwin v. Burrows*, *supra*, p. 215.) The rule is often broadly stated that where one of two innocent parties must suffer for the fraud of a third, he who furnishes to the third party the means by which he perpetrates the fraud and receives the benefit of it must bear the loss. If, on the facts of the whole case, the conduct of the defendants toward Mitchell shows by fair inference that the act of the agent in making the promise to Deyo with the preconceived purpose of breaking it was their act either by antecedent authorization or by ratification, and that defendants are, therefore, chargeable therewith on the axiom of agency, *qui facit per alium, facit per se*, the question still remains whether Mitchell's false promises were a proximate cause; a real, direct and immediate cause, of plaintiffs' misfortune. The existence of a valid right of action does not require that such wrongful conduct should be the *sole* cause of plaintiffs' loss; it is enough to show that it was an essential cause. But if plaintiffs' own conduct was the primary and substantial cause of their loss; if they had no right to rely exclusively upon the assurance of Mitchell when they might have prevented the loss themselves, they cannot recover. While it has been said that "negligence as a defense in cases of fraud has been in danger of being pushed too far" (*Long v. Inhabitants of Athol*, 196 Mass. 497, 505); while the courts in such cases teach the lesson of honesty rather than the lesson of care (*Albany City Svcs. Instn. v. Burdick*, 87 N. Y. 40; *Western Mfg. Co. v. Cotton*, 126

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Ky. 749; *Schumaker v. Mather*, 133 N. Y. 590; *Alexander v. Brogley*, 63 N. J. L. 307); while, if the fraud is the basis of a mutual agreement, it may well be that the incautious should be protected rather than the wicked and that negligence should not bar relief from a willful fraud, yet these rules should not be extended to make principals responsible for the instrumentalities which their agent employs in their behalf when fraud and carelessness do not meet at the inception of a contract or the consummation of a sale; when negligence follows fraud and is a succeeding and independent rather than a concurrent cause of loss.

The first cause of plaintiffs' loss was Carver's dishonesty. That a thief and gambler should reform after one easy lesson on the wickedness of amateur speculation on the stock market with the funds of clients is conceivable; that he may relapse is an existing danger. But his dishonesty alone would not defeat a recovery. (*DeLaBere v. Pearson*, 1907, 1 K. B. 483; *affd.*, 1908, 1 K. B. 280.)

Another efficient cause appears. Carver could not have stolen the money with which he resumed his operations if plaintiffs had not for two years kept him in their firm with unrestricted opportunities to indulge in his weakness. A third cause was the fraud of Mitchell. Mitchell knew that Carver was an unsuccessful gambler, but Deyo did not disclose that he had been a thief, and it is difficult to assume that Mitchell should have foreseen in November, 1910, that the natural result of secrecy as to future dealings would be to make him one. A stock speculator is not necessarily a dishonest person. Mitchell knew, however, as well as any one that stock gamblers are prone to go beyond their means and involve themselves and others in ruin, and that Carver was a ruined gamester. If Mitchell did not have a mind fatally bent on mischief, he at least was recklessly indifferent to the methods which his good customer might employ in obtaining money and we may infer that he was as indifferent in that regard when

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he lied to Deyo as when he took the money that Carver brought to him. A jury might say that his false representations contributed to plaintiffs' loss, but callous as he may have been, he was not its primary author. (*Jez v. Straus*, 122 N. Y. 293.) From plaintiffs the law exacted the duty of reasonable care after the false representations were made. It was not the natural result of Mitchell's promises that they should take the word of the gambler and defaulter and of the manager of the business that made profits out of all conditions of men, not excluding such as Carver, and use no further care for their own protection. By their easy confidence in Carver whom they knew, rather than in Mitchell who was comparatively a stranger, they facilitated rather than hindered their partner in his illegal operations. They should have been on their guard. They were not insured by Mitchell against loss. They had no reason to take as settled that Carver had become immune by one attack of the mania of speculation or that Mitchell would be governed by any fine sense of honor toward them. It was not as if Carver came to them as a stranger on defendants' recommendation. It was not their money which was jeopardized when they left it in unworthy hands. It was the money of clients to whom they owed a duty of more active vigilance than comes of mere reliance on promises such as these. Deyo knew that Mitchell owed his allegiance to a concern with which the highly respected and trusted law firm had no community of interest. Means of knowledge of Carver's speculations were more open to Mitchell than to Deyo. Knowledge of Carver's embezzlements was open entirely to Deyo. The stealing rather than the speculation was the immediate cause of plaintiffs' loss and the wrong of Mitchell became injurious only in consequence of plaintiffs' own subsequent omissions. (*Critten v. Chemical Nat. Bank*, 171 N. Y. 219.) Plaintiffs' conduct was in a way commendable in the consideration

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they showed their erring partner, but thereby they subjected themselves to a serious risk. Their confidence was not justified. They may be charitably regarded as unfortunate rather than morally delinquent, but Carver's acts were not abnormal, as they very well knew, and their trust in him was the final decisive cause of their loss.

The special verdict separates the damages so as to state the amount of Carver's embezzlements from each of a number of clients, but this action is not brought to trace trust funds and the judgment cannot be sustained on any such theory.

It follows that the judgment appealed from must be reversed and the judgment of nonsuit be affirmed, with costs in this court and in the Appellate Division.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ., concur.

Judgment reversed, etc.

MEMORANDA

OF

*DECISIONS RENDERED DURING THE PERIOD EMBRACED IN
THIS VOLUME.*

FREDERICK KROENKE, an Infant, by HENRY F. KROENKE,
His Guardian ad Litem, Appellant, v. JOSEPH JOHNSON,
Respondent.

Kroenke v. Johnson, 171 App. Div. 935, reversed.

(Submitted November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 13, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff while riding on Bedford avenue in the borough of Brooklyn was run down and injured by an automobile owned by the city of New York, and operated by the fire department of the city of New York. The defendant, then fire commissioner of the city of New York, was using the car to go from fire headquarters in New York to inspect new fire houses in Brooklyn, and returning therefrom to attend a presentation of medals. The car was being driven at the time by a subordinate of the defendant, a uniformed member of the fire department, subject to the orders and control of the defendant. The complaint was dismissed on the theory that because the relation between the defendant and the driver was not that of master and servant, no speed, however excessive, could tend to fasten upon the defendant a liability for the injury.

Herbert C. Smyth, James B. Mackie and Julius M. Lowenstein for appellants.

William P. Burr, Corporation Counsel (Terence Farley of counsel), for respondent.

Judgment reversed and new trial granted, costs to abide event, on authority of *Dowler v. Johnson* (225 N. Y. 39.)

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

HAMILTON TRUST COMPANY, Respondent, *v.* WILLIAM K. DICKERSON et al., Defendants, and LEANDER B. FABER, as Receiver in Supplementary Proceedings of PATRICK H. FLYNN, Appellant.

Hamilton Trust Co. v. Dickerson, 173 App. Div. 900, affirmed.

(Submitted November 13, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 9, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage on real property. The mortgaged property was conveyed to the defendant Dickerson, the mortgagor, by Joseph F. McClean, as sole acting executor of the will of Sara McCarty, deceased. Sara McCarty acquired title to the property from her brother John McCarty. Foreclosure search disclosed an uncanceled *lis pendens* against the property in an action in the Supreme Court, Kings county, by one J. K. O. Sherwood on behalf of himself and all other creditors of John McCarty, deceased, against McClean, as executor of Sara McCarty, and others, to set aside as fraudulent the conveyance to Sara McCarty. Because the defendant Flynn was made a defendant in that action as a creditor of John McCarty, Flynn and Faber, the appellant herein as receiver, together with the other creditors of John McCarty, were made defendants in this action. The Sherwood suit was tried and disposed

of and the *us pendens* was canceled and this action was discontinued as against all of the creditors of John McCarty, deceased, except Faber, as receiver, who in his answer alleged that the acts and transactions of Joseph F. McClean, as sole executor of Sara A. McCarty, deceased, with respect to said real property, were in contravention of the provisions of the will of Sara A. McCarty, deceased, and invalid.

Charles L. Craig for appellant.

Edward J. Connolly for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and McLAUGHLIN, JJ. Not sitting: CRANE, J.

THE A. E. MCBEE COMPANY, INCORPORATED, Respondent, *v.* ROOT KNIGHT COMPANY, INCORPORATED, et al., Defendants, and ROBERT E. SHOEMAKER, Appellant.

McBee Co., Inc., v. Shoemaker, 174 App. Div. 291, affirmed.

(Submitted November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 13, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action upon a promissory note. Defendant, appellant, alleged that he was an indorser upon a note of the Root Knight Company held by the Harriman National Bank and in order that the same might be renewed in his absence, he indorsed a new note of that company for \$2,500 and left the same with the president of the company for the purpose of renewing the note which was about to fall due at the Harriman National Bank; that instead of using the new note for the purpose intended and for which the defendant's indorsement was obtained, it was turned over without defendant's knowledge or consent to the Street Railways Advertising Company who paid therefor the sum of \$500 and applied the balance, \$2,000, upon an

antecedent debt of another company in which the defendant had no interest whatever; that defendant has since been compelled to pay the note held by the bank, which was allowed to go to protest.

Frank E. Loughran for appellant.

John J. Quencer for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

ALBERT G. WHEELER, JR., Appellant, *v.* CLAUDIA T. WHEELER, Respondent.

Wheeler v. Wheeler, 172 App. Div. 955, affirmed.

(Argued November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 8, 1916, modifying and affirming as modified a judgment in favor of defendant entered upon a verdict in an action of replevin. Plaintiff and defendant were husband and wife and had separated. The husband sought to obtain possession of household furniture and effects. The wife pleaded title.

Eli J. Blair and *Frank H. Platt* for appellant.

Charles B. Templeton, *Jonah J. Goldstein* and *Joseph Hirschman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

JACOB GLOCKNER et al., Doing Business as J. GLOCKNER & Co., Respondents, *v.* GREAT EASTERN CASUALTY COMPANY, Appellant.

Glockner v. Great Eastern Casualty Co., 174 App. Div. 873, affirmed.

(Argued November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered July 8, 1916, modifying and affirming as modified a judgment in favor of plaintiffs entered upon a verdict in an action upon a policy of burglary insurance. The defendant denied that the loss was as large as claimed by plaintiff and that question presented the only issue.

I. Maurice Wormser and Joseph L. Prager for appellant.
Otto A. Samuels for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

FEDERAL TERRA COTTA COMPANY, Appellant, *v.* POTTERTON BROTHERS, INCORPORATED, Respondent.

Federal Terra Cotta Co. v. Potterton Bros., Inc., 172 App. Div. 705, affirmed.

(Argued November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment entered May 29, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, overruling plaintiffs' exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment in favor of defendant dismissing the complaint. The action was to recover the value of certain terra cotta which plaintiff had manufactured under a written contract with defendant. The defense was failure of performance within the time fixed by the contract.

William W. Niles and Madison Grant for appellant.
Joab H. Banton for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

JOHN DAVIES, Respondent, *v.* MISSOURI, KANSAS AND
TEXAS RAILWAY COMPANY, Appellant.

Davies v. Missouri, K. & T. Ry. Co., 173 App. Div. 935, affirmed.

(Submitted November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 15, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The complaint contained ten causes of action, each founded upon the allegation that the plaintiff was the owner and holder of a certain promissory note in writing made by the defendant on or about the 1st day of May, 1913, wherein and whereby the defendant promised to pay to bearer the sum of \$1,000 with interest thereon at five per cent per annum on the 1st day of May, 1915, the amount whereof had not been paid. The answer denied that the defendant made such a contract and as a separate defense alleged that in each of the notes referred to the promise to pay to bearer was not independent but was to be performed expressly under and upon the terms and conditions set forth in a certain trust agreement, which, with the notes therein referred to, formed one instrument and that in each of said notes it was provided on the face thereof that the principal amount provided to be paid should become due in the event that a default as defined in the trust agreement should happen and then should become due and payable in the manner and with the effect therein provided.

M. E. Harby for appellant.

Edward L. Blackmar for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

APEX LEASING COMPANY, INCORPORATED, Appellant, *v.*
SAMUEL LITKE, Defendant, and LITKE STORES, INCORPORATED, Respondent.

Apex Leasing Co., Inc., v. Litke, 173 App. Div. 323, affirmed.
(Argued November 20, 1918; decided December 10, 1918.)

APPEAL from a judgment entered June 23, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The judgment at Special Term set aside a certain sale of merchandise in bulk as void under section 44 of the Personal Property Law. One Samuel Litke, the owner of two stores, sold one of them to defendant. At the time of the sale he gave to the purchaser a list of his creditors, but did not include the name of plaintiff. Plaintiff was not notified of the sale, and, therefore, attacked the validity thereof because at the time of the transfer there was an outstanding lease existing between plaintiff and Litke for the other store, having a little less than four years to run at an annual rental. The lease contained a clause providing that in case of non-payment of rent the landlord might terminate the lease and repossess himself of the premises by summary or dispossession proceedings, and that in that event the landlord might relet the premises and the tenant would pay the difference between the amount to be paid as rent reserved and the amount of rent which shall be collected. Later on, Litke was dispossessed from the said store by summary proceedings for the non-payment of one month's rent, whereby the lease was canceled and the landlord repossessed himself of the premises. Plaintiff subsequently brought action against Litke for its damages resulting from its failure to re-rent the store and recovered judgment, and upon this claim and judgment predicated its right to maintain this action upon the theory that its claim for these damages consti-

tuted it a creditor within the provisions of the Bulk Sales Law.

Walter H. Bond for appellant.

Arthur Furber and *Henry H. Glass* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

LYDIA E. GILMORE, Respondent, *v.* EDWIN SHUTTLEWORTH et al., Defendants, STUARD HIRSCHMAN, Appellant, and PHOEBE A. LAMS, Respondent.

Gilmore v. Hirschman, 171 App. Div. 594, affirmed.

(Argued November 21, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered March 21, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage upon real property. Plaintiff had a mortgage on a plot of land in Ravenswood, fronting on the East river; the city had instituted condemnation proceedings to take a strip of it for a street; an award of \$32,000 for the land taken had been made; an assessment made for \$16,672 on benefits on the remaining portion had been set aside, and a re-assessment ordered; by means of alleged false representation, appellant obtained from plaintiff a release of her lien and collected the award. The judgment, in the usual form of a decree in foreclosure, also vacated the release as between the parties (preserving it as to the city, which had parted with its money in good faith), restored the plaintiff's lien on the net proceeds of the award, and there being thus two sets of security for her mortgage, to wit, the land retained, and the net proceeds of the land condemned, marshalled those securities by applying the rule as to inverse order of alienation, and directed that the land retained be first sold and in case the proceeds did not yield enough to

pay plaintiff's mortgage, interest and costs, that the defendant should pay the deficiency to the extent of the amount in appellant's hands as the net proceeds of the award.

A. S. Gilbert and David Cohen for appellant.

John Brooks Leavitt and N. Otis Rockwood for plaintiff, respondent.

John H. Henshaw for defendant, respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

IRVING NATIONAL BANK et al., Appellants, v. LYDIA B. GRAY et al., Respondents.

Irving National Bank v. Gray, 174 App. Div. 29, appeal dismissed. (Argued November 21, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 21, 1916, unanimously affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at Special Term. Plaintiffs brought this action as judgment creditors of defendant Olin D. Gray against him, his wife and the Gray Realty and Development Company to impress a trust upon certain real property standing in the name of Gray's wife and the realty company for which it is alleged the judgment debtor furnished the consideration and purchase money, though prior to the time when the plaintiffs became creditors of Gray. At the opening of the trial the court granted a motion to dismiss the complaint on the ground that it failed to state facts constituting a cause of action.

I. Maurice Wormser, I. Gainsburg and Saul Gordon for appellants.

William W. Pellet and James S. Lehmaier for respondents.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

WILLIAM E. REDDING, Respondent, *v.* THE CITY OF
NEW YORK, Appellant.

Redding v. City of New York, 174 App. Div. 872, affirmed.
(Argued November 21, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 8, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff while walking on Bleeker street in the city of New York slipped on an accumulation of ice upon the sidewalk and falling received the injuries complained of. The complaint alleged: "That on or about the 21st day of February, 1914, and for some time prior thereto, the defendant negligently and carelessly permitted that portion of the public highways at or in front of premises commonly known as either 277 or 279 Bleeker street, in the said borough of Manhattan, city of New York, to be and remain in a dangerous and unsafe state and condition, in permitting and allowing an accumulation of ice to exist upon the sidewalk at said place as above stated." The answer was a general denial.

William P. Burr, Corporation Counsel (*Terence Farley* of counsel), for appellant.

Don R. Almy and *William S. Evans* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ. Dissenting: CUDDEBACK, J.

**MERRICK THEATRE COMPANY, INCORPORATED, Appellant,
v. WEISSAGER AMUSEMENT CONSTRUCTION COMPANY
et al., Respondents, Impleaded with Another.**

Merrick Theatre Co. v. Weissager Amusement Constr. Co., 174 App. Div. 865, affirmed.

(Submitted November 22, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 27, 1916, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. This action was brought to foreclose a lien for \$16,958.38, the balance of a deposit of \$18,500 given by plaintiff to secure its compliance with the terms of a lease of a theatre in premises on Boston road, borough of The Bronx, New York city. On July 24, 1913, defendant Weissager Company, as landlord, and plaintiff, as tenant, entered into a lease of the theatre in a building to be erected by the landlord on Boston road, for the term of twenty-one years after completion. The plaintiff went into possession of the theatre on March 1, 1914. On April 9, 1914, the Weissager Company, assigned the lease to the Haffen Company. On December 9, 1914, the plaintiff was dispossessed on a warrant duly issued in summary proceedings brought against it by the Haffen Company for failure to pay the November, 1914, rent. The plaintiff in this action alleged that after such dispossession, and in December, 1914, the Haffen Company "in its own name and behalf and for its own benefit, and not as agent for, nor in the name of, nor for the benefit of plaintiff," entered into a lease with an unknown person of the demised premises "upon different covenants, terms and conditions, and for a longer term than provided" for in plaintiff's lease; that said new lessee duly entered into possession of the demised premises; and that "by reason thereof plaintiff was discharged and released of and from any and all liability" under its lease, "and

thereupon terminated and rescinded " the same, and became entitled to the return of the deposit, less rent for November, 1914. Defendants denied these allegations.

I. Maurice Wormser, Leon Laski and Gerald B. Rosenheim for appellant.

Max Monfried for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

MARY F. SPRINGSTEEN, Appellant, *v.* WALTER F. SPRINGSTEEN et al., Respondents.

Springsteen v. Springsteen, 172 App. Div. 605, affirmed.

(Submitted November 22, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 12, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the admeasurement of dower. The question was: If a widow, rather than a stranger, is given a life estate in specific real estate, does that fact prevent her from collecting her dower in the same property, payable out of either the specific real estate or the personalty? The Special Term held that plaintiff had a life estate and also a dower interest which she was entitled to collect by a sale of the equity (*i. e.*, the fee subject to the life estate), and if enough was not realized from that source, to collect the deficit from the residuary estate (personalty). The Appellate Division modified the decree by holding that while plaintiff was entitled to both the life estate and the dower, they were co-existent, and the dower could not be collected from any source.

Alexander S. Bacon for appellant.

Edward D. Kenyon and *Frank W. Harris* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JOSEPH GREGORY, Appellant.

People v. Gregory, 178 App. Div. 930, affirmed.

(Argued November 25, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 11, 1917, which affirmed a judgment rendered at a Trial Term for the county of Kings upon a verdict convicting the defendant of the crime of compulsory prostitution of women.

David F. Price, George W. Martin and Abraham Kesselman for appellant.

Harry E. Lewis, District Attorney (Harry G. Anderson and Ralph E. Hemstreet of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

ASSETS COLLECTING COMPANY, Appellant, v. SAMUEL J. GOLDSMITH et al., Defendants, and EMANUEL J. MYERS et al., Respondents.

Assets Collecting Co. v. Myers, 170 App. Div. 265, affirmed.

(Argued November 25, 1918; decided December 10, 1918.)

APPEAL from a judgment, entered January 19, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which reversed an order of Special Term denying a motion by defendants for judgment on the pleadings and granted said motion. The action was brought to recover damages for the alleged malicious prosecution of a bankruptcy proceeding in the United States District Court for the Southern District of New York to have Otto Heinze & Co., as

copartners and the individual members, adjudicated involuntary bankrupts, and of which cause of action plaintiff claimed to be the assignee by divers *mesne* assignments.

Lawrence E. Brown and *Ferdinand E. M. Bullowa* for appellant.

Louis Marshall, *Emanuel J. Myers* and *Gordon S. P. Kleeberg* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

S. SHANKEN METAL CEILING COMPANY, INC., Respondent, *v.* FORT MASONRY COMPANY et al., Respondents, and SAMUEL RABINOWITZ et al., Appellants.

S. Shanken Metal Ceiling Co. v. Fort Masonry Co., 174 App. Div. 856, affirmed.

(Argued November 25, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 20, 1916, affirming a judgment in favor of plaintiff and defendant, respondent, entered upon a decision of the Bronx County Court at a Trial Term without a jury in an action to foreclose a mechanic's lien. Plaintiff was a subcontractor of the defendant Fort Masonry Company which by its answer set up a claim for foreclosure of a mechanic's lien filed by it. The answer of the defendants, appellants, the owners, denied that the general contractor had substantially performed its contract and as a separate defense alleged the execution by said contractor of an agreement of indemnity which it had failed to perform.

Emil Weitzner and *David Steckler* for appellants.

Louis Weinberger for plaintiff, respondent.

Bernard Gordon and *William Jasie* for defendants, respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

ALBERT B. GROSS et al., Copartners under the Firm Name of GROSS, ENGEL & Co., Respondents, v. ARTHUR MENDEL et al., Copartners under the Firm Name of ALBERT MENDEL & Co., Appellants.

Gross v. Mendel, 171 App. Div. 237, affirmed.

(Argued November 25, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 18, 1916, modifying and affirming as modified a judgment in favor of plaintiffs entered upon a decision of the court at a Trial Term without a jury. Plaintiffs sought to recover from defendants upon three causes of action wherein they set forth in substance that on April 15, 1914, defendants, at London, England, accepted a bill of exchange drawn by and payable to plaintiffs at Leipsig, Germany, on August 15, 1914, in the sum of 7,000 marks (German money); that on February 24, 1914, defendants likewise accepted a bill of exchange, drawn by and payable to plaintiffs at the same place on September 30, 1914, in the sum of 8,000 marks; that on April 22, 1914, defendants accepted a third bill of exchange, similarly drawn and payable at the same place on December 31, 1914, in the sum of 2,000 marks. It was alleged, in respect of these three bills, that they were not paid when presented therefor at Leipsig and were thereupon protested at a varying expense to plaintiffs. The question litigated was as to the rate of exchange which should be the measure of defendants' liability. They contended that the rate of exchange existing at the time of the trial should govern. The Appellate Division held as a matter of law that all of said bills of exchange were to be converted into money of the United States at the rate of exchange

between Leipsig and New York prevailing at the time of maturity of each of said bills of exchange.

James Garfield Moses for appellants.

Benjamin Berger for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

GILBERT O. SMITH, Appellant, *v.* ELIJAH OSTERHOUT, Respondent.

Smith v. Osterhout, 173 App. Div. 912, affirmed.

(Argued November 26, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered April 6, 1916, affirming a judgment in favor of defendant entered upon a decision of the court at a Trial Term without a jury in an action to compel specific performance of a contract to purchase real property. The answer set up as a separate defense that the execution of the contract was induced by certain false and fraudulent representations, and a counterclaim for the return of a sum paid by defendant on the signing of the contract, on the ground that it was obtained from the defendant by means of false and fraudulent representations.

Harry N. Selvae for appellant.

Caleb H. Baumes for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

DOMINICK SPRADA, Respondent, *v.* INTERNATIONAL RAILWAY COMPANY, Appellant.

Sprada v. International Railway Co., 173 App. Div. 1003, affirmed.

(Argued November 26, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department,

entered June 5, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The complaint alleged that prior to the 12th day of April, 1913, the defendant negligently, wrongfully and unlawfully placed, constructed and maintained an obstruction in Broadway near Sobieski street, consisting of earth, dirt, ashes and other material three feet high, ten feet long and six feet wide between the tracks and the curb on the north side of the street, constituting a nuisance and menace to the people using this street and was a wrongful and unlawful obstruction therein; that on the 12th day of April, 1913, plaintiff was driving westerly on Broadway in a prudent manner when the horse he was driving became frightened and ran away and over this pile of dirt and threw plaintiff to the pavement, fracturing his right leg.

Harold S. Brown for appellant.

La Fay C. Wilkie for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and McLAUGHLIN, JJ. Not sitting: ANDREWS, J.

HENRY W. BRIDGES, Respondent, *v.* BROOKLYN UNION GAS COMPANY, Appellant.

Bridges v. Brooklyn Union Gas Co., 174 App. Div. 907, affirmed.
(Argued November 27, 1918; decided December 10, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 17, 1916, affirming a judgment in favor of plaintiff entered upon a verdict. The action was brought to recover for certain legal services rendered by plaintiff, an attorney, to defendant in an attempt to bring about a settlement of certain certiorari proceedings then pending to test the special franchise tax assessment

against defendant for the years 1906, 1907, 1908 and 1909. The answer put in issue the performance of the services as enumerated in the complaint, and their value. As an affirmative defense, defendant alleged that it had agreed, through its agent, to give plaintiff a retainer, but that plaintiff should receive no further compensation unless he succeeded in effecting a reduction in the assessments in question to an amount corresponding relatively to the reduction that had been secured in the case of the Consolidated Gas Company, in which plaintiff had previously been employed, and in effecting a settlement of the Newtown Gas Company's claims against the city for gas supplied, and that, in case plaintiff should succeed in bringing about these results, any further compensation to him should be determined by its agent, in his absolute discretion. It was further alleged that plaintiff wholly failed to effect such settlements, and that the agent had decided plaintiff was not entitled to any compensation beyond the retainer already paid to him.

Herbert C. Smyth for appellant.

William N. Cohen for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

HUDSON NAVIGATION COMPANY, Appellant, *v.* THE UNION TRUST COMPANY OF ALBANY, NEW YORK, et al., Respondents.

Hudson Navigation Co. v. Union Trust Co., 183 App. Div. 192. appeal dismissed.

(Submitted December 2, 1918; decided December 10, 1918.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 12, 1918, unanimously affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury.

The motion was made upon the grounds that an appeal did not lie as of right to the Court of Appeals and that permission to appeal had not been obtained.

Arthur L. Andrews and *Thomas S. Fagan* for motion.

Stuart G. Gibboney and *Joseph Diehl Fackenthal* opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

WILLIAM J. MAXWELL, Respondent, *v.* HENRY L. MARSH
et al., Appellants.

Maxwell v. Marsh, 173 App. Div. 1003, affirmed.

(Argued November 20, 1918; decided December 13, 1918.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 1, 1916, affirming a judgment in favor of plaintiff entered upon a verdict. The complaint alleged that prior to and at the time of the commencement of the action, the defendants were engaged in conducting a retail store for the sale of meats and provisions which were intended to be used as food, located in Rochester. The plaintiff, as a customer, came to this store on December 2, 1913, and purchased a quantity of meat to be used as food, and which was used as food by this plaintiff and his family, and it is contended that this meat was unwholesome and unfit for human food and that the plaintiff became poisoned from its use and suffered damages. The action was tried on the theory that upon the sale of such meat, under the circumstances of the case, there was an implied warranty that it was at the time of its sale wholesome and fit for human consumption.

P. Chamberlain for appellants.

D. W. Forsyth for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

LAWRENCE E. BROWN, as Substituted Trustee under the Will of AGNES H. ROBINSON, Deceased, Respondent, *v.* CHARLES A. ROBINSON, Individually and as Trustee under the Will of AGNES H. ROBINSON, Deceased, et al., Respondents, and EAGLE INSURANCE COMPANY OF LONDON, ENGLAND, Appellant.

(Submitted December 9, 1918; decided December 13, 1918.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 224 N. Y. 301.)

STANDARD SAND AND GRAVEL COMPANY, Respondent, *v.* THE CITY OF NEW YORK et al., Defendants.

THE ROYAL COMPANY OF NEW YORK, Appellant and Respondent, and FREDENBURG & LOUNSBURY, Respondent.

(Submitted December 9, 1918; decided December 13, 1918.)

Motion to amend remittitur denied. (See 224 N. Y. 687.)

THE TRAVELERS INSURANCE COMPANY, Appellant, *v.* LOUIS PADULA COMPANY, INCORPORATED, Respondent.

(Submitted December 9, 1918; decided December 13, 1918.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 224 N. Y. 397.)

IDA G. TRUMBULL, Respondent, *v.* THOMAS E. BOMBARD, Appellant.

Trumbull v. Bombard, 171 App. Div. 700, affirmed.

(Argued November 22, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered March 15, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court at a

Trial Term without a jury. Plaintiff leased to defendant certain premises with an option to purchase at a stated price and the defendant entered into possession. During the term of the lease a fire occurred which practically destroyed the building and the lessor collected insurance thereon. The lessee thereupon notified the lessor that he elected to exercise his option to purchase and that he would retain possession as purchaser, but offered to pay only the difference between the amount of insurance collected and the agreed price. The lessor refused to accept less than the full amount of the agreed price and brought this action to recover rent.

Arthur S. Hogue for appellant.

C. J. Vert for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

CHRISTOPHER BOYLE, Appellant, *v.* MALLORY STEAMSHIP COMPANY, Respondent.

Boyle v. Mallory Steamship Co., 173 App. Div. 936, affirmed.
(Argued November 27, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 20, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. The complaint alleged that while plaintiff was a passenger on one of defendant's vessels it negligently permitted soot and cinders to be emitted from the smoke stack and that a particle entering plaintiff's eye caused inflammation resulting in loss of sight.

William Van Wyck and *William F. Purdy* for appellant.

Henry M. Hewitt and *James A. Hatch* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOZO, McLAUGHLIN and ANDREWS, JJ. Dissenting: HOGAN and POUND, JJ.

CHARLES CRANFORD, Appellant, *v.* BROOKLYN HEIGHTS
RAILROAD COMPANY, Respondent.

Cranford v. Brooklyn Heights R. R. Co., 168 App. Div. 457, affirmed.
(Argued December 2, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 27, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. Plaintiff entered into a contract with defendant involving the lowering of part of its right of way, the building of retaining walls and the relocation of its tracks. The contractor sued upon four causes of action, alleging substantial completion, and demanding upon cause 1 for work done and certified under the contract the sum of \$54,235.92; upon cause 2 for work done under the contract and not certified the sum of \$18,879.91; upon cause 3 for damages for breach of contract prior to August 31, 1906, the sum of \$14,254.70; and upon cause 4 for damages for breach of contract subsequent to August 31, 1906, the sum of \$97,295.04. Defendant joined issue on the allegations of the complaint and set up a counterclaim for \$93,904.66 for labor and materials furnished. Plaintiff duly replied joining issue upon the counterclaim.

Edward M. Grout and *James F. McKinney* for appellant.
John L. Wells, *Charles A. Woody* and *George D. Yeomans* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ. Taking no part: COLLIN, J.

SIDNEY BLUMENTHAL & COMPANY, Respondent, v.
BERNARD RADOW et al., Appellants.

Blumenthal & Co. v. Radow, 173 App. Div. 968, affirmed.

(Submitted December 3, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 31, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for an alleged breach of contract. The complaint alleged that defendants entered into a written contract whereby they agreed to purchase from the plaintiff certain goods at an agreed price; that part of the goods were delivered but that defendants refused to accept or pay for the balance. Defendants contended that the contract sued upon lacked elements of mutuality and definiteness and that plaintiff by demanding advance payments and failing to deliver goods breached the contract so as to relieve defendants from liability.

G. A. McLaughlin for appellants.

Laurence Arnold Tanzer, Eugene Blumenthal and David Levy for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and CRANE, JJ. Not sitting: McLAUGHLIN, J.

AMERICAN BONDING COMPANY OF BALTIMORE, Respondent, v. GEORGE T. KELLY, Appellant.

American Bonding Co. of Baltimore v. Kelly, 172 App. Div. 437, affirmed.

(Submitted December 3, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 3, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover premiums alleged to be due on a guaranty bond entered into by the plaintiff guarantee-

ing performance by defendant of a building contract. The complaint alleged that defendant agreed "in writing" to pay "each year during the period when said bond should be in force, a premium of \$346.44; that said bond is still in force and plaintiff still liable upon said bond," and asked for a judgment for premiums which became due July 19, 1912, and July 19, 1913. The answer alleged that the written contract called for the payment of only \$346.44, which amount had been paid, and denied the other allegations of the complaint.

George W. Elkins for appellant.

James A. Hughes for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

FLORA L. VOSE, Respondent, *v.* JOSEPH C. CONKLING et al., Appellants.

Vose v. Conkling, 174 App. Div. 892, affirmed.

(Argued December 3, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 28, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action brought under section 101 of the Decedent Estate Law by the plaintiff claiming to be a creditor of Maria L. Conkling who died testate in 1909, to recover from the defendants as her devisees the amount of two deficiency judgments entered on the foreclosure of mortgages.

Edgar J. Nathan and *Alfred H. Cumbers* for appellants.

John Brooks Leavitt and *N. Otis Rockwood*, for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

ISIDORE BROWNFIELD, as President of LOCAL UNION No. 4, UNITED GARMENT WORKERS OF AMERICA, Respondent, v. LOUIS SIMON, as President of NEW YORK CLOTHING CUTTERS, LOCAL UNION No. 4, Appellant.

Brownfield v. Simon, 174 App. Div. 872, affirmed.

(Submitted December 3, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 6, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term determining that plaintiff was the owner of and entitled to the possession of the funds on deposit with the Manhattan Savings Institution in the name of New York Clothing Cutters, Local Union No. 4. In 1915 Local Union No. 4, United Garment Workers of America had about 1,600 members. About three-fourths of said membership decided to affiliate with the Amalgamated Clothing Workers of America. The remaining one-fourth continued their affiliation with the United Garment Workers and elected new officers. The question was as to which was the owner of the property of the original association.

Morris Hillquit for appellant.

Nathan Waxman, *Max D. Steuer* and *H. Danziger* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and CRANE, JJ. Not sitting: McLAUGHLIN, J.

OSCAR M. HAYMAN et al., Appellants, v. CANTON ART METAL COMPANY, Respondent.

Hayman v. Canton Art Metal Co., 174 App. Div. 923, affirmed.

(Argued December 3, 1918; decided January 7, 1919.)

APPEAL from a judgment, entered July 12, 1916, upon an order of the Appellate Division of the Supreme Court

in the fourth judicial department, reversing a judgment in favor of plaintiffs entered upon a verdict directed by the court, and directing a dismissal of the complaint. The action is brought to recover damages for an alleged breach of contract of sale. The complaint alleged that on March 3, 1915, plaintiffs and defendant entered into a contract whereby defendant agreed to sell and deliver 31,346 pounds of zinc spelter and 6,760 pounds of zinc dross at eight and three-quarters cents per pound, delivery to be forthwith, a certified check for \$1,000 to be mailed by plaintiffs forthwith and the balance to be paid thereafter; that plaintiffs performed the agreement on their part, but that defendant refused to perform. The answer, after a denial, as a further defense alleged that any pretended agreement of sale was not in writing and was void under the Statute of Frauds.

Vernon Cole for appellants.

D. N. McNaughton for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK and McLAUGHLIN, JJ. Dissenting: COLLIN, HOGAN and CRANE, JJ.

HENRY L. DE CAUMONT et al., Appellants, *v.* TRUSTEES OF ROMAN CATHOLIC CHURCH OF ST. LOUIS et al., Respondents.

de Caumont v. Trustees, R. C. Church of St. Louis, 174 App. Div. 902, affirmed.

(Argued December 3, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered June 16, 1916, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action of ejectment. The complaint alleged that on and prior to January 1, 1829, one Louis LeCouteulx was the owner

of the premises in question; that on that date he and his wife executed and delivered to John DuBois, Roman Catholic bishop of New York, a conveyance of the premises, which is set forth in the complaint *in totidem verbis* and to which more particular reference will be made; that the conveyance conveyed merely a life estate to the said bishop; that Louis LeCouteulx died in 1840, leaving Pierre Alphonse LeCouteulx as residuary legatee under his will, the residuary estate including the reversion in the lands covered by said conveyance; that Bishop DuBois died in 1842 and that the plaintiffs are the sole heirs of Pierre Alphonse LeCouteulx and, therefore, entitled to possession of the premises sought to be recovered. The answer admitted the execution of the conveyance alleged in the complaint, the death of Louis LeCouteulx in 1840 and of Bishop DuBois in 1842, the death of Pierre Alphonse LeCouteulx and defendants' possession of the premises. It denied that Bishop DuBois had only a life estate in the property, the ownership of the premises by Pierre Alphonse LeCouteulx at any time and the ownership of the premises by the plaintiffs and their right to possession. It further set up title by adverse possession.

Edward C. Randall, Benjamin S. Dean and Donald Harper for appellants.

George Clinton, Jr., for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, HOGAN, McLAUGHLIN and CRANE, JJ. Taking no part: CUDDEBACK, J.

JULIUS BISCHOFSKY, Respondent, *v.* IGNATZ WOHL, Appellant.

Bischofsky v. Wohl, 174 App. Div. 890, affirmed.

(Argued December 4, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department,

entered July 7, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to compel specific performance of a contract to sell real property or for damages. Defendant's title was traced back to a deed from one Eggert who went into bankruptcy while seized of the premises and nine years before he conveyed to appellant's predecessor in interest. Eggert's petition in bankruptcy did not disclose his ownership of the premises and the trial court held that his estate might still be reopened by the Federal court and that the possibility that it might be reopened rendered title unmarketable.

Harry Percy David for appellant.

Earl J. Helmick for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CHASE, COLLIN, CUDDEBACK, HOGAN and McLAUGHLIN, JJ. Dissenting: HISCOCK, Ch. J., and CRANE, J.

WILLIAM C. GRAY, as Receiver of ROCHESTER, CORNING AND ELMIRA TRACTION COMPANY, Appellant, v. OTTO C. HEINZE et al., Respondents.

Gray v. Heinze, 174 App. Div. 924, affirmed.

(Argued December 4, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered August 28, 1916, affirming a judgment in favor of plaintiff entered upon a dismissal of the complaint by the court on trial at Special Term in an action against former directors of the Rochester, Corning and Elmira Traction Company, to require them to account for money of the corporation which the complaint alleges was taken and withdrawn from the corporation and paid to and received by the defendants Heinze and Schultze and converted by them to their own use pursuant to an alleged conspiracy entered into between all the defendants.

Abraham Benedict and *Harlan W. Rippey* for appellant.

Daniel P. Hays, Edwin D. Hays, Wales F. Severance, Louis H. Moss and Gaston Rosensteil for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

HERMAN FALLERT, as Administrator of HERMAN W. FALLERT, Deceased, Appellant, v. MASSACHUSETTS BONDING AND INSURANCE COMPANY, Respondent, Impleaded with Another.

Fallert v. Massachusetts Bonding & Ins. Co., 172 App. Div. 680, affirmed.

(Argued December 4, 1918; decided January 7, 1919.)

APPEAL from a judgment entered May 12, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court, and directing a dismissal of the complaint. A contractor in the city of New York as a condition to a license to use explosives furnished a bond with the defendant, respondent, as surety conditioned for the payment of any "loss, damage or injury resulting to persons or property" from explosives. Plaintiff's intestate was killed September 11, 1909, as the result of a blast, and on January 30, 1912, this action was commenced to recover for his death. The defense was that the action was not commenced within two years after the accident as required by section 1902 of the Code of Civil Procedure. Plaintiff contended that the action was not brought to recover under the statute; that it was an action upon a bond, under seal, and, therefore, the plaintiff had, under section 381 of the Code of Civil Procedure twenty years within which to bring the action.

Saul Gordon, Milton Mayer and Simon Rasch for appellant.

John R. Halsey for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and CRANE, JJ. Not sitting: McLAUGHLIN, J.

PRESTON B. SEAMAN, Appellant, *v.* THE CITY OF NEW YORK, Respondent.

Seaman v. City of New York, 172 App. Div. 740, affirmed.

(Argued December 5, 1918; decided January 7, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 27, 1916, affirming a judgment in favor of defendant entered upon a verdict. This action was brought to recover under two separate causes of action. The first cause of action alleged the employment in March, 1905, of the plaintiff by the defendant, acting by and through the president of the borough of Queens, to prepare and furnish to the defendant all of the plans and specifications, etc., for the erection and full completion, together with the supervision of a combination borough hall and county court house building for the borough of Queens, said services to be paid for by the defendant at the usual and customary rates of commissions allowed architects; that plaintiff entered upon the performance of this contract and duly prepared and completed all the preliminary studies and specifications and furnished the same to the defendant, who duly approved and accepted the same, and thereafter the plaintiff continuing his performance prepared and completed the necessary plans and specifications sufficiently complete to enable prospective bidders and contractors to make reliable estimates upon which to make their bids, and that said plans were duly approved, accepted and retained by the defendant. For a second cause of action plaintiff alleged damages for the refusal of the defendant to permit him to complete the detailed drawings for said building and supervise its construction. The defendant

in its answer pleaded a general denial to both causes of action and in addition set up the following separate defenses to each cause of action: *First*, that the plaintiff had been fully paid by the defendant each and every sum due; *second*, that at the time plaintiff claimed to have been employed pursuant to the contract specified in the complaint he was in the employ of the defendant as a draftsman and that he actually received his salary as such draftsman during all the period, which said salary was in full compensation for all services performed for the defendant, also that plaintiff could not hold two positions; *third*, that there was no appropriation and the contract as alleged was *ultra vires*; *fourth*, that the art commission had rejected the plans.

Nicholas W. Hacker for appellant.

William P. Burr, Corporation Counsel (*Terence Farley* and *William E. C. Mayer* of counsel), for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

GEORGE C. ANDREWS, Respondent, *v.* FRANK R. PIERSON, as President of the VILLAGE OF TARRYTOWN, et al., Appellants.

Andrews v. Pierson, 174 App. Div. 478, affirmed.

(Argued December 5, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 4, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in a taxpayer's action under section 1925 of the Code of Civil Procedure. The judgment in substance determined that the resolution of the board of trustees of the village of Tarrytown adopted on the 4th day of January, 1916, fixing the salary of the defendant William B. Moorhouse as police justice for

the term commencing January 1, 1916, at \$1,000 per year, payable monthly, was absolutely void and constituted a waste of and injury to the estate, funds and other property of the said village, and enjoined and restrained the said board of trustees from performing any of the conditions of said resolution, and from paying to said William B. Moorhouse as police justice any salary in excess of fifty-five dollars per month during his term of office of four years, and restrained and enjoined said William B. Moorhouse from collecting for his salary as police justice during his term of office any sum in excess of fifty-five dollars per month as provided by resolution of the board of trustees of said village of Tarrytown adopted December 12, 1911.

Hugh A. Thornton and *Clarence S. Davison* for appellants.

George C. Andrews for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

CITY OF SYRACUSE, Respondent, *v.* ONONDAGA COUNTY SAVINGS BANK, Appellant, Impleaded with Others.

City of Syracuse v. Onondaga Co. Sav. Bank, 174 App. Div. 902, affirmed.

(Submitted December 6, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered September 26, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was brought by the plaintiff for the foreclosure of the general city tax of the city of Syracuse for the year 1908, assessed against the defendant, the Onondaga County Savings Bank, as the owner of two vacant lots in said city. The relief sought was the sale of the lots and a judgment against

the Onondaga County Savings Bank for any deficiency on account of the general city tax of 1908, and all other taxes and local improvement assessments which had been levied or assessed subsequent to the tax upon which this action is brought. The question was whether under chapter 385 of the Laws of 1911 the defendant Onondaga County Savings Bank was personally liable for a local improvement assessment so as to warrant a deficiency judgment for the amount thereof.

Harold Stone for appellant.

Stewart F. Hancock, Corporation Counsel, for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

MORRIS SYRKIN, Appellant, *v.* IRVING KESNER et al.,
Respondents.

Syrkin v. Kesner, 175 App. Div. 321, affirmed.

(Submitted December 6, 1918; decided January 7, 1919.)

APPEAL from a judgment, entered December 7, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint. The action was brought upon a jail limit undertaking executed by defendants whereby it was provided that defendant Kesner should not go without the liberties of the county of New York until discharged. Thereafter on June 15, 1914, it was alleged Kesner was seen in the county of Bronx. The trial court denied defendants' motions to dismiss the complaint, made upon the ground that it did not state facts sufficient to constitute a cause of action, defendants' contention being that on said June 15, 1914, the jail liberties of New York county included Bronx county, and that, therefore, Kesner's presence in Bronx county on that date did not constitute an escape,

but the Appellate Division reversed the judgment and dismissed the complaint.

Harry N. Wessel for appellant.

Harry H. Bernstein and *Morris M. Becher* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: *HISCOCK*, Ch. J., *CHASE*, *COLLIN*, *CUDDEBACK*, *HOGAN*, *McLAUGHLIN* and *CRANE*, JJ.

CORA MAUDE CLARKE, Respondent, *v.* *JOHN L. MARTIN*,
Appellant.

Clarke v. Martin, 175 App. Div. 919, affirmed.

(Argued December 9, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 10, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict in an action to recover for an alleged breach of promise to marry. The complaint alleged a promise of marriage in August or September, 1907, and a breach by the defendant by his marriage to another in the month of March, 1912, and that in reliance upon defendant's promise the plaintiff lived and cohabited with the defendant in and after 1907 and up to the time of the defendant's marriage. The answer admitted the defendant's marriage, denied all of the other allegations of the complaint and set up, as an affirmative defense, that in or about October, 1908, the plaintiff and defendant mutually agreed to rescind the contract to marry and as a partial defense and in mitigation of damages that prior to and about the time of the agreement alleged in the complaint and subsequent thereto, the plaintiff accepted money for her maintenance and support from other men, lived in different apartments in the city of New York, in the borough of Manhattan and borough of Brooklyn, under the protection of these men, falsely represented to the

defendant the sources of her income, associated with evil characters and lived under names other than her true and proper name.

William M. Parke, John B. Stanchfield and J. Arthur Leve for appellant.

Aaron P. Jetmore for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

ANNIE CROGAN, Respondent, *v.* ACHILLES PERSION, as Treasurer of INTERNATIONAL HOD CARRIERS AND BUILDING LABORERS' UNION OF AMERICA, Appellant.

Crogan v. Persion, 173 App. Div. 292, affirmed.

(Submitted December 9, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 13, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The action was brought by plaintiff to recover upon an alleged contract of insurance upon the life of her deceased husband and as assignee of ten others similarly situated. The alleged death benefits are for one hundred dollars each, to which plaintiff asserted she was entitled by virtue of the "constitution and general rules" of the International Hod Carriers and Building Laborers' Union of America, an unincorporated labor union. The complaint alleged the death of the members named; the relationship of the beneficiaries; that pursuant to the constitution and general rules of the said union there became due and payable to such beneficiaries, on the death of each of the said members, a death benefit of \$100; that there was in the general fund of the union more than sufficient money to pay all claims and that due notice and proof of death has been given and payment demanded and refused. The answer denied all of the allegations of the complaint

except as to the existence of the society and its treasurer and the possession of sufficient funds to pay the claims. It alleged, as a separate defense, that the deceased members named in the complaint were members of a subordinate local union, which, prior to the dates of the several deaths, had been suspended for failure to comply with the laws of the society and that thereby the said members were suspended and debarred from all benefits, and as a further defense that proofs of death, due books and other documents in connection therewith were not furnished as required by the laws of the society.

William F. Ashley, Jr., and Andrew Foulds, Jr., for appellant.

William A. McQuaid for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

WOLFE M. SPIEGEL, Respondent, *v.* BENJAMIN LOWENSTEIN, Appellant.

Spiegel v. Lowenstein, 171 App. Div. 971, affirmed.

(Argued December 10, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 8, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover the purchase price of goods alleged to have been sold and delivered. The cause of action was not denied by the answer, but the defendant set up a counterclaim for alleged breach of agreement to deliver a quantity of copper wire and brass and bronze turnings. The plaintiff in his reply denied the material allegations of the counterclaim and also interposed the defense of the Statute of Frauds.

Max D. Steuer, Alfred Frankenthaler and I. Maurice Wormser for appellant.

Lewis E. Mosher for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

FEDAR KOPANCES, Respondent, *v.* OCEAN STEAMSHIP
COMPANY OF SAVANNAH, Appellant.

Kopances v. Ocean Steamship Co. of Savannah, 175 App. Div. 932, affirmed.

(Argued December 10, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 5, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. The action was brought under the provisions of the Employers' Liability Act as amended by chapter 352 of the Laws of 1910. Plaintiff, while working as a long-shoreman at pier 35, North river, in the borough of Manhattan, sustained injury as a result of defendant negligently causing and permitting a heavy gangplank or skid to be dropped upon his feet, while he was in a position which prevented his removing to a place of safety when the plank was about to be dropped. Defendant contended that the claim asserted on the trial and upon which the plaintiff was allowed to go to the jury was essentially different from that presented in the notice of claim served.

Herbert Barry and *John W. Farquhar* for appellant.

Sydney A. Syme for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

ALBERT BARBER, Appellant, v. W. A. CASE & SON
MANUFACTURING COMPANY, Respondent.

Barber v. Case & Son Manfg. Co., 172 App. Div. 942, affirmed.
(Argued December 11, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered February 3, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Plaintiff was the assignee of several insurance companies and sued to recover the amount of a loss by fire alleged to have been caused to the plant of the Wood Products Company through the negligence of one Lange, an employee of defendant, who in attempting to repair a pipe in said plant applied a blow pipe thereto, thus igniting alcoholic fumes which were passing through. The trial court held that, although Lange was the general servant of the defendant, he was loaned or hired by the Case Manufacturing Company to the Wood Products Company for such services in his general line of copper-smith as the Wood Products Company should see fit to put him to work at, and that he thereupon became, as to that service so far as he was under the direction of the Wood Products Company, as to the work to be done, and on this occasion even as to the manner of the work, the servant of the Wood Products Company.

Vernon Cole for appellant.

Simon Fleischmann and *Alonzo G. Hinkley* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO and ANDREWS, JJ. Not sitting: POUND, J.

THOMAS E. WING, as Substituted Trustee, Respondent,
v. DELEVAN SMITH, Appellant.

Wing v. Smith, 173 App. Div. 57, affirmed.

(Argued December 12, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 6, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. The defendant and twenty-eight others, who severally owned in the aggregate 2,000 shares of the capital stock in the Refugio Syndicate, a New Jersey corporation, which was all the stock issued at that time, entered into an agreement by which they constituted two of their number, George W. McElhiney and Ernest A. Wiltsee, "Syndicate Managers," for the purchase of the remaining unissued stock of the corporation aggregating 8,000 shares, and thereby authorized the managers to purchase for the several subscribers an amount of the unissued stock in proportion to their respective holdings of the stock theretofore issued, and each subscriber agreed to pay his subscription on call of the managers as therein provided. The agreement was subsequently pledged with the Guardian Trust Company, as trustee for whoever should become the holder of a note for \$800,000, made by the syndicate managers payable to bearer to raise money for the purchase of said unissued stock, but which was subsequently delivered to said Refugio Syndicate itself for the stock. The trust company resigned as trustee on September 28, 1910, and the plaintiff became trustee in its place, and brought this action to recover the balance unpaid on defendant's subscription which was for \$24,600, upon which he paid \$6,150 and the recovery is for the balance together with interest. The answer set up three defenses: *First*, that the Refugio Syndicate was a New Jersey corporation and that the 8,000 shares of its stock in suit were issued in consideration of a note and not for money or property as

required by the General Corporation Law. *Second*, that the Refugio Syndicate, a foreign corporation, conducted business in the State of New York without the certificate required by section 15 of the General Corporation Law of this state. *Third*, that there had been assigned and transferred in the city of New York 2,000 shares of said stock without payment of the tax required by chapter 241 of the Laws of 1905.

Charles A. Decker for appellant.

Philip Russell and *Burt D. Whedon* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

WILLIAM H. GREIS et al., Appellants, *v.* CITY OF SYRACUSE,
Respondent.

Greis v. City of Syracuse, 175 App. Div. 910, affirmed.

(Argued December 12, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 11, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. This action was brought by the plaintiffs, as copartners and joint owners of certain real property located in the city of Syracuse, and adjoining North State street and Ash street as laid out on the map. The complaint alleged that the plaintiffs were in possession of the property described as Ash street, and had been for many years; that the property had been occupied by the plaintiffs and their grantors as a coal yard and that the plaintiffs and their grantors had for many years erected and maintained buildings and structures covering the premises and expended large sums of money in the erection and maintenance of the structures and plants upon the property. It alleged further that the city had threatened to eject

them from the property and demanded judgment that the defendant, its officers, agents and servants be perpetually restrained from entering upon or interfering with the lands described in the complaint, or from exercising any control over or doing any work upon the same as a public street. The answer of the defendant alleged that the property in question was a street and that it was the duty of the city to keep the street open; that the plaintiffs were in possession, defendant had demanded possession, and demanded judgment that the plaintiffs be ordered to remove the buildings from the premises in question.

Frank E. Young for appellants.

Frank Hopkins and Stewart F. Hancock for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, CARDOZO and POUND, JJ. Not voting: HISCOCK, Ch. J. Not sitting: ANDREWS, J.

MINNIE B. EDWARDS, Respondent, *v.* FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant.

Edwards v. Fidelity & Casualty Co. of New York, 175 App. Div. 913, affirmed.

(Argued December 13, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 25, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action upon a policy of accident insurance. The complaint alleged that on the 15th day of March, 1909, one Austin M. Edwards obtained a policy of insurance from the defendant which insured him against "bodily injuries" sustained by him "through accidental means, and resulting directly, independently and exclusively of all other causes" in death, and against blood poisoning resulting from bodily injury sustained through accidental means; that on or about January 14, 1915, the said Edwards

became afflicted with blood poisoning, resulting directly from a bodily injury, consisting of a cut or abrasion of the skin at the back of his neck, sustained through accidental means, and resulting directly, independently and exclusively of all other causes in his death. The answer admitted the issuance of the policy, and the death of the insured, but denied that death was caused by bodily injury sustained through accidental means, and resulting directly, independently and exclusively of all other causes, or that blood poisoning resulted directly from bodily injury within the meaning of the policy.

Carlton E. Ladd for appellant.

Irving W. Cole and *Hamilton Ward* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

ANNIE M. GREENE, Respondent, *v.* MARY A. GREENE,
Appellant, Impleaded with Others.

Greene v. Greene, 174 App. Div. 882, affirmed.

(Argued December 13, 1918; decided January 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage. The answer set up a defense of *res adjudicata*, alleging that in a prior action between the same parties it had been adjudged that the mortgage had been satisfied of record. (See 215 N. Y. 651.)

Charles A. Webber for appellant.

Herbert C. Smyth, *John W. Browne*, *Frederic C. Scofield* and *Roderic Wellman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

JULIA E. COOK, Respondent, *v.* THE PEOPLE'S MILK
COMPANY, Appellant.

Cook v. People's Milk Co., 175 App. Div. 966, affirmed.

(Argued December 10, 1918; decided January 14, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 24, 1916, affirming a judgment in favor of plaintiff entered upon a verdict. This action is for negligence for alleged injury caused to plaintiff by consuming milk which, it is alleged in the plaintiff's bill of particulars, contained phosphorous. The complaint alleged that the milk was sold to plaintiff by a grocer who had purchased the same in a bottle from the defendant. The complaint sets forth two causes of action, the first based on negligence and the second on warranty. The second cause of action was dismissed at the close of plaintiff's case, and no appeal was taken by plaintiff. The question, therefore, was whether or not the plaintiff proved that the milk at the time it left defendant's plant contained phosphorous due to negligence of defendant.

Walter Jeffreys Carlin for appellant.

Ralph S. Kent and *W. Bartlett Sumner* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK,
CARDOZO, POUND and ANDREWS, JJ.

WILLIAM H. JENKINS, Respondent, *v.* CHESTER B. TEED,
Appellant.

Jenkins v. Teed, 174 App. Div. 900, affirmed.

(Submitted December 12, 1918; decided January 14, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 14, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for the alleged conversion of certain cows. The answer

contained a general denial and an allegation of ownership and possession in a third person from whom defendant acquired title by purchase.

Charles R. O'Connor for appellant.

Alexander Neish for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

JOHN J. CALLANAN, Respondent, *v.* EMILY M. KEENAN, as Executrix of DANIEL F. KEENAN, Deceased, Appellant.

(Submitted January 6, 1919; decided January 14, 1919.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 224 N. Y. 503.)

EUGENE A. RUDIGER et al., Appellants, *v.* JAMES S. COLEMAN et al., Respondents.

Reported below, 184 App. Div. 897.

(Argued January 6, 1919; decided January 14, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered August 2, 1918, modifying and affirming as modified a judgment entered upon the report of a referee bringing up for review intermediate orders.

The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal.

Edwin J. Freedman for motion.

John C. Wait opposed.

Per Curiam. We think that the judgment entered upon the report of the referee as modified and affirmed by the Appellate Division is appealable to this court and, therefore, the motion to dismiss the appeal is denied.

This determination, however, should not be regarded as indicating that we think that the appellants can bring up for review on said appeal all of the intermediate orders specified in their notice. Apparently such notice indicates an intent to ask this court to review practically all of the proceedings which have ever been taken in this long litigation, and it is perfectly manifest that some of the orders are discretionary while others cannot be regarded as necessarily affecting the final judgment now before us for review, and, therefore, they cannot be considered on this appeal.

The motion should be denied, without costs.

All concur.

Motion denied.

CHARLES LEOPOLD, Respondent, *v.* CITY OF NEW YORK,
Appellant.

Reported below, 184 App. Div. 244.

(Argued January 6, 1919; decided January 14, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered August 8, 1918, affirming in part and reversing in part a judgment in favor of plaintiff entered upon a verdict.

The motion was made upon the ground that the judgment appealed from was interlocutory inasmuch as it granted a new trial as to part of the judgment appealed from.

John C. Wait for motion.

John R. Salmon opposed.

Motion denied, with ten dollars costs, but without prejudice to right to move to dismiss appeal from so much of judgment as granted new trial as to item of \$1,709.30, unless appellant within ten days files stipulation for judgment absolute in case said order of reversal is affirmed as to said item.

WILLIAM P. LOGAN, Respondent, v. ALBERT GUGGENHEIM, Appellant.

Logan v. Guggenheim, 181 App. Div. 914, appeal dismissed.

(Submitted January 6, 1919; decided January 14, 1919.)

MOTION to dismiss an appeal from a judgment entered January 15, 1918, upon an order of the Appellate Division of the Supreme Court in the third judicial department, which reversed an order of the court at a Trial Term, setting aside a verdict in favor of plaintiff and granting a new trial and reinstated said verdict.

The motion was made upon the ground that an appeal did not lie of right to the Court of Appeals and that permission to appeal had not been obtained.

Erskine C. Rogers for motion.

Daniel W. Blumenthal opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

MICHAEL J. KENNEDY, Appellant, v. NATIONAL JEWELERS' BOARD OF TRADE, Respondent, Impleaded with Others.

Kennedy v. Natl. Jewelers' Bd. of Trade, 179 App. Div. 948, appeal dismissed.

(Argued January 6, 1919; decided January 14, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered July 28, 1917, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term.

The motion was made upon the ground that the plaintiff was deceased; that the action was one for malicious prosecution; that a motion to substitute the executor of the said plaintiff in his stead had been denied and that said cause of action had abated.

C. G. Fryer for motion.

Robert E. Whalen opposed.

Motion granted, without costs.

JOHN N. PRESTON, as Administrator of the Estate of WILLARD G. PRESTON, Deceased, Appellant, *v.* PENNSYLVANIA RAILROAD COMPANY, Respondent.

Preston v. Pennsylvania R. R. Co., 136 App. Div. 911, appeal dismissed.

(Submitted January 6, 1919; decided January 14, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 23, 1914, *unanimously* affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term, in an action to recover for the death of plaintiff's intestate alleged to have been occasioned through the negligence of defendant.

The motion was made upon the ground that an appeal did not lie as of right to the Court of Appeals and that permission to appeal had not been obtained.

Frank Rumsey for motion.

No one opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

HERMAN STEINER et al., Copartners under the Firm Name of ZUCKER, STEINER & COMPANY, Appellants, *v.* AMERICAN ALCOHOL Co., INC., Respondent.

Steiner v. American Alcohol Co., Inc., 181 App. Div. 309, affirmed.
(Submitted January 6, 1919; decided January 21, 1919.)

APPEAL from a judgment, entered April 22, 1918, upon an order of the Appellate Division of the Supreme Court in the first judicial department which reversed an order of Special Term overruling a demurrer to the complaint and sustained such demurrer. The complaint alleged that plaintiffs and defendants entered into a certain agreement whereby defendant agreed to sell and the plaintiffs to purchase certain merchandise; that the agreement of sale was oral, and that plain-

tiffs stated it would be necessary to reduce said agreement to writing, but defendant falsely represented to plaintiffs that it would fully perform its agreement and make delivery of the merchandise in accordance therewith as if said agreement were reduced to writing; that said representations were false and untrue and defendant did not intend to perform said agreement and did not intend to deliver said merchandise; that said fraudulent representations were made with the intention of avoiding the reduction of said agreement to writing and with the further intention of cheating and inducing plaintiffs not to purchase similar goods in the open market; that plaintiffs, in reliance upon such statements, did not purchase similar goods, as they could have done at the price mentioned in the agreement; that thereafter defendant repudiated the contract and refused to perform it and that at the time of such repudiation the market price of the goods had advanced so that plaintiffs were unable to purchase similar goods except at a price in excess of the agreed price.

A. Herman Friesner for appellants.

Max Schenkman for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

In the Matter of the Accounting of THE FARMERS' LOAN AND TRUST COMPANY, as Temporary Administrator, and as Administrator with the Will Annexed of the Estate of EDWIN O. BRINCKERHOFF, Deceased.
NEW YORK ASSOCIATION FOR IMPROVING THE CONDITION OF THE POOR et al., Appellants; EVELINA D. CLARK et al., Respondents.

Matter of Farmers' Loan & Trust Co., 181 App. Div. 642, affirmed.
(Submitted January 6, 1919; decided January 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered

March 8, 1918, modifying and affirming as modified a decree of the New York County Surrogate's Court settling the accounts of the administrator of the estate of Edwin O. Brinckerhoff, deceased. The controversy related to allowances made by the Supreme Court, out of the surplus income of the testator, Edwin O. Brinckerhoff, an incompetent person, during his lifetime, to certain of his next of kin, collateral relations, for their support and maintenance; and the question was whether those allowances should be treated as part of the testator's estate on final distribution. The allowances aggregated \$20,717.50. The surrogate held that they constituted advances on account of the respective distributive shares in the estate of the next of kin who had received the allowances, and that their amount should be added to the amounts in the administrator's hands for the purpose of computing the shares of the parties. This ruling the Appellate Division reversed.

Francis Smyth, George N. Whittlesey and Matthew C. Fleming for appellants.

Ezekiel Fixman and Clarence M. Lewis for respondents.

Order affirmed, with costs; no opinion.

Concur: CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ. Not voting: HISCOCK, Ch. J.

MARY C. O'KEEFE, Appellant, *v.* J. FRED DUGAN, as Acting Town Clerk of the Town of Riverhead, et al., Respondents.

ROBERT P. GRIFFING et al., Intervenors, Respondents.

O'Keeffe v. Dugan, 185 App. Div. 53, affirmed.

(Argued January 6, 1919; decided January 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 6, 1918, which reversed an order of Special Term granting an injunction restraining the acting town clerk of the town of Riverhead

from submitting to the electors at the town meeting to be held November 5, 1918, the question of local option.

The following questions were certified: *First.* Was the petition herein duly acknowledged by the electors subscribing the same as required by section 13 of the Liquor Tax Law in a form sufficient to give jurisdiction to the town meeting to vote on the local option questions authorized by said section? *Second.* Is the proof by subscribing witnesses of the signatures of electors subscribing the petition herein a sufficient compliance with the requirements of section 13 of the Liquor Tax Law respecting the signing and acknowledgment by electors of petitions for the submission of the questions herein provided? *Third.* Does section 11 of the General Construction Law govern section 13 of the Liquor Tax Law as to the acknowledgment of the petition thereby provided?

Percy L. Housel for appellant.

Harry D. Sanders and *Robert P. Griffing* for respondents.

Order affirmed, with costs, and questions certified answered in the affirmative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ. Not voting: HOGAN, J.

In the Matter of the Claim of MICHAEL DUGAN against HARRY J. McARDLE, INCORPORATED, et al., Respondents.

STATE INDUSTRIAL COMMISSION, Appellant.

Dugan v. McArdle, Inc., 184 App. Div. 570, affirmed.

(Argued January 6, 1919; decided January 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 14, 1918, reversing an award of the state industrial commission made under the Workmen's Compensation Law. Two questions were involved: (1) Whether the employer's business was that of storage

within the meaning of group 29 of section 2 of the Workmen's Compensation Law, and (2) whether there was evidence sustaining the finding of the commission that the employer and the insurance carrier were not prejudiced by the failure of the employee to give written notice of the injury, as required by section 18 of the statute.

Charles D. Newton, Attorney-General (E. C. Aiken of counsel), for appellant.

E. C. Sherwood, William B. Davis and Amos H. Stephens for respondents.

Order affirmed, with costs against the state industrial commission; no opinion.

Concur: HISCOCK, Ch. J., CHASE, McLAUGHLIN and ANDREWS, JJ. Dissenting: HOGAN, CARDOZO and POUND, JJ.

In the Matter of the Claim of MELBOURN HALEY, Respondent, against THE BOSTON AND ALBANY RAILROAD, Appellant.

STATE INDUSTRIAL COMMISSION, Respondent.

Haley v. Boston & Albany Railroad, 186 App. Div. 926, affirmed.

(Argued January 6, 1919; decided January 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 25, 1918, *unanimously* affirming an award of the state industrial commission made under the Workmen's Compensation Law. Claimant was employed by the defendant railroad as operator of a coal pocket at Rensselaer. While engaged in his duties one of his fingers was caught in the machinery and crushed. The coal pocket, at the time of claimant's injury, was in regular use by the railroad for the purpose of supplying coal to its locomotives, used in the transportation of freight and passengers from the cities of Albany and Rensselaer, N. Y., to various points in Massachusetts. Defendant contended that the Federal

Employers' Liability Act alone measured the rights and liabilities of the parties.

Robert E. Whalen for appellant.

Charles D. Newton, Attorney-General (*E. C. Aiken* of counsel), for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Accounting of WILLIAM M. HOES,
as Administrator of the Estate of EDWARD BREWIS,
Deceased, Appellant.

EDWARD W. B. BREWIS, as Executor of EDWARD
BREWIS, Deceased, Respondent.

Matter of Hoes, 183 App. Div. 930, affirmed.

(Submitted January 7, 1919; decided January 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 26, 1918, which affirmed a decree of the New York County Surrogate's Court settling the accounts of the public administrator of the county of New York as administrator of the estate of Edward Brewis, deceased.

The following question was certified: "Is the public administrator of the county of New York entitled, under section 3 of chapter 230 of the Laws of 1898, to commissions upon securities received by him and not converted into cash but delivered in kind to an ancillary executor?"

Albert Van Winkle and *Frank W. Arnold* for appellant.

William E. Sims for respondent.

Order affirmed, with costs, and question certified answered in the negative; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

FREDERICK A. TROWBRIDGE, as Executor of HENRY TROWBRIDGE, Deceased, Respondent, *v.* ELLIS P. EARLE et al., Defendants.

GEORGE C. MARTENS, Appellant.

Trowbridge v. Earle, 184 App. Div. 960, appeal dismissed.

(Argued January 7, 1919; decided January 21, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered June 21, 1918, which *unanimously* affirmed an order of the Queens County Court denying the motion of George C. Martens to be relieved of his purchase at a foreclosure sale in the above-entitled action and to return to him ten per cent of the purchase price paid by him to the referee at the time of said sale and for a further order directing plaintiff to pay the said purchaser interest on said moneys together with the costs and expenses of examining the title. Leave was not obtained either from the Appellate Division or from this court to appeal from said order of affirmance, nor were any questions certified by the Appellate Division which in its opinion ought to be reviewed by this court. Defendant contended, consequently, that this court had no jurisdiction to hear or entertain the appeal.

Richard T. Greene and *Daniel S. Murphy* for appellant.

Arthur P. Hilton and *Frederick N. Smith* for respondent.

Appeal dismissed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Transfer Tax upon the Estate of
LAURA N. RICHARDS, Deceased.

THE COMPTROLLER OF THE STATE OF NEW YORK, Appellant; NELSON S. SPENCER, as Executor, Respondent.

Matter of Richards, 182 App. Div. 572, affirmed.

(Argued January 7, 1919; decided January 21, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial

department, entered April 5, 1918, which *unanimously* affirmed an order of the New York County Surrogate's Court adjudging that no transfer tax should be assessed upon the estate of Laura N. Richards, deceased, who died on January 5, 1917, a resident of the state of California, owning four bonds of domestic "real estate" corporations, each secured by mortgage upon specific real estate owned by each corporation respectively. One of these bonds was within the state of New York. The others were in California. The appraiser included these four bonds in his report as taxable, and a taxing order was entered accordingly. From that order the executor appealed to the surrogate upon the ground that the said appraisal and the said order erroneously and contrary to the law include as property subject to taxation under the Transfer Tax Law bonds owned by the testatrix and in her possession without the state of New York; and that said order erroneously and contrary to law assesses a tax thereon. The surrogate reversed the taxing order and adjudged that the transfer of the property of the decedent was exempt from tax.

John B. Gleason and Lafayette B. Gleason for appellant.

Nelson S. Spencer and Otto C. Wierum, Jr., for respondent.

Order affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ. Dissenting: CHASE, J. Dissents as to bond for \$700: POUND, J.

ALFRED SOHLAND, Appellant, *v.* PENNSYLVANIA SILK COMPANY, Respondent, Impleaded with Others.

Sohland v. Pennsylvania Silk Co., 184 App. Div. 889, affirmed. (Argued January 7, 1919; decided January 21, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 17, 1918, *unanimously*

affirming a judgment in favor of defendant, respondent, entered upon an order of Special Term granting its motion for judgment on the pleadings and directing as to it a dismissal of the complaint in an action to recover for an alleged breach of a contract of employment. The complaint alleged a wrongful discharge. The defendant Pennsylvania Silk Company answered, and moved for judgment upon the pleadings, because of insufficiency of the complaint, claiming that the contract was so indefinite, contradictory, unintelligible and lacking in mutuality as to be void and unenforcible, and that in any event the contract was terminable at will, so that there could be no breach of contract in discharging plaintiff.

Irving L. Ernst and Walter E. Ernst for appellant.

Herbert R. Limburg and Morris J. Hirsch for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

HARRIET E. NOBLE, Appellant, v. WILLIAM B. KENDALL, as Surviving Partner of the Firm of KENDALL & WHITLOCK, Respondent, Impleaded with Others.

Appeal — not authorized direct to Court of Appeals from final judgment entered upon reversal of interlocutory orders.

An appeal cannot be taken direct to the Court of Appeals from a final judgment entered after a reversal by the Appellate Division of interlocutory orders of Special Term. Section 1336 of the Code of Civil Procedure does not apply. (*Will v. Barnwell*, 197 N. Y. 298; *Stemmler v. Alsdorf*, 224 N. Y. 426, followed; *Rose v. Bristol*, 222 N. Y. 11, distinguished.)

Noble v. Kendall, 182 App. Div. 801, appeal dismissed.

(Argued January 6, 1919; decided January 21, 1919.)

MOTION to dismiss an appeal from two orders of the Appellate Division of the Supreme Court in the first judicial department, entered May 3, 1918, the first of which reversed an order of Special Term overruling a demurrer to the complaint and sustained such demurrer and the second of which reversed an order of Special

Term denying a motion by defendant for judgment on the pleadings and granted said motion. Also appeal from the judgment entered June 15, 1918, upon said orders, dismissing the complaint.

H. P. Coursen for motion.

Charles A. Winter opposed.

Per Curiam. The motion to dismiss the appeal must be granted. The Appellate Division in reversing the action of the Special Term made two interlocutory orders, one sustaining defendant's demurrer to the complaint, and the other granting defendant's motion for judgment on the pleadings, and in each case granted leave to the plaintiff to amend her complaint. The plaintiff having declined to avail herself of this privilege, final judgment was thereafter entered in the Supreme Court dismissing the complaint, with costs.

Under these circumstances the plaintiff could not appeal from the final judgment entered against her directly to this court.

The orders of the Appellate Division were interlocutory and, therefore, no appeal could be taken therefrom to this court without permission, which was not obtained. (Code Civ. Pro. § 190.)

The final judgment entered after the refusal of plaintiff to amend was not so entered after an *affirmance* by the Appellate Division of the orders of the Special Term overruling the demurrer and denying judgment on the pleadings, and, therefore, section 1336 of the Code permitting an appeal directly to this court does not apply. (*Will v. Barnwell*, 197 N. Y. 298; *Stemmler v. Alsdorf*, 224 N. Y. 426.)

The case of *Rose v. Bristol* (222 N. Y. 11), cited by the appellant as justification for her course, is not applicable. As was pointed out in that case, the judgment rendered by the Appellate Division was a final one dismissing the complaint and, therefore, the appeal could be and properly should have been taken directly to this court.

The motion should be granted and appeal dismissed, with costs and ten dollars costs of motion.

HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Appeal dismissed.

MABEL BARBOUR, Appellant, *v.* THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Respondent.

Barbour v. Equitable Life Assur. Society of U. S., 174 App. Div. 759, affirmed.

(Argued December 13, 1918; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered December 11, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover upon a policy of life insurance. The defense was non-payment of a premium. Plaintiff alleged by way of excuse, avoidance, waiver and estoppel certain alleged promises and representations made by defendant's general agent and manager.

L. B. McKelvey for appellant.

Charles W. Pierson and *William Carrell Diamond* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* JOHN COLLINS, Appellant, *v.* JOHN B. TROMBLY, Agent and Warden of Clinton Prison., Respondent.

People ex rel. Collins v. Trombly, 186 App. Div. 928, appeal dismissed.

(Argued January 8, 1919; decided January 28, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered

November 15, 1918, which *unanimously* affirmed an order of Special Term dismissing a writ of habeas corpus

Frederick L. Hackenburg for appellant.

Charles D. Newton, Attorney-General (*Wilber W. Chambers* and *Edward G. Griffin* of counsel), for respondent.

Appeal dismissed on authority of *People ex rel. Curtis v. Kidney* (225 N. Y. 299).

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

THE COMERMA COMPANY, Appellant, *v.* JOHN COMERMA et al., Respondents.

Comerma Co. v. Comerma, 182 App. Div. 576, affirmed.
(Submitted January 8, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 15, 1918, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The judgment enjoined the defendants from engaging in the construction of structures of flat tile and the class of tile work known as "Guastavino Arches," "Spanish Tile Arches," "Cohesive Tile Arches," "Timbrel Vaults," "Timbrel Tile Construction" or "Comerma Tile Arches," from making, using or vending any construction described in United States letters patent No. 947,177 issued January 18, 1910, to R. Guastavino, for improvements in masonry structures, which cover a certain type of masonry arch, and from making, using or vending any construction described in United States letters patent No. 1,119,543, issued December 1, 1914, to W. C. Sabine and R. Guastavino for a type of acoustic material for walls and ceilings, and adjudged that the plaintiff recover against defendants damages received by them as profits upon such prohibited

structures built by them. The Appellate Division, while leaving in the judgment the provision that the defendants were restrained from violating the contract of February 23, 1915, and from engaging in the construction of "Guastavino Arches," "Spanish Tile Arches," "Cohesive Tile Arches," "Timbrel Vaults," "Timbrel Tile Construction" and "Comerma Tile Arches," struck out the provision in the judgment of the Special Term which enjoined the defendants from building the structures described in the two patents, and reduced the money judgment by eliminating damages with regard to these.

Edward H. Wilson for appellant.

Frederick R. Ryan and *Roderic Wellman* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

In the Matter of the Petition of HERBERT S. SISSON,
as State Commissioner of Excise, Appellant, for
Revocation of a Liquor Tax Certificate.

WILLIAM A. DECKER, Respondent.

Matter of Sisson v. Decker, 184 App. Div. 623, affirmed.

(Submitted January 8, 1919; decided January 28, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the third judicial department, entered November 26, 1918, which reversed an order of Special Term granting a motion for the revocation of a liquor tax certificate and dismissed said petition. The respondent Decker during the year ending September 30, 1917, lawfully conducted a liquor business at No. 448 Broadway in the city of Kingston. It being a city having a population of less than 55,000, a commission was appointed under the authority of chapter 623 of the Laws of 1917, to reduce the number of places in said town, and this commission met and designated No. 571 Broadway, Kingston, as a place in which the

traffic in liquor might be conducted after October 1, 1917, and also designated No. 448 Broadway, Kingston, as a place in which traffic in liquor might not be conducted after October 1, 1917. The respondent thereupon secured possession of the premises No. 571 Broadway, and took out a liquor tax certificate for such premises for the year commencing October 1, 1917. On October 13, 1917, he procured a transfer of such liquor tax certificate to No. 448 Broadway, filing an application statement with the county treasurer, and at the same time filing what is known as a notice of abandonment, abandoning the traffic at 571 Broadway in favor of 448 Broadway. It is conceded that there are a number of buildings nine-tenths of the cubic space of which is occupied as dwellings within 300 feet of No. 448 Broadway, and that no consents have been obtained therefor. The Appellate Division held that consents were unnecessary.

Porter L. Merriman and Harry D. Sanders for appellant.
Andrew J. Cook for respondent.

Order affirmed, with costs, on opinion of LYON, J., below.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ. Dissenting: POUND, J.

CHARLES H. BROWN, Respondent, *v.* PROTECTED HOME CIRCLE, Appellant.

Brown v. Protected Home Circle, 171 App. Div. 976, affirmed.
(Submitted January 8, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 21, 1915, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover upon a benefit certificate issued by the defendant to plaintiff's wife and providing that if, at the time of her death, she was a member in good standing of defendant, it would pay to plaintiff the amount mentioned therein.

It was conceded that the dues and monthly payment for November, 1910, were not paid within the time prescribed in the certificate and in the defendant's by-laws, but it appeared that such dues and payments were paid to and received and accepted as such by the defendant's agent, after the prescribed time for payment and prior to her death. The question was presented whether there was a waiver by the defendant of the provisions of the certificate and by-laws relating to the prompt payment of dues or assessments.

S. Fay Carr for appellant.

August Becker for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

LEWIS M. JONES et al., Copartners, Doing Business as
LEWIS M. JONES COMPANY, Appellants, v. AUGUSTUS
C. DOWNING, Respondent.

Jones v. Downing, 173 App. Div. 989, affirmed.

(Argued January 10, 1919; decided January 23, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered June 7, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover commissions on the sale of certain real property. The answer denied the allegations of the complaint and set up as separate defenses that defendant never employed the plaintiffs to negotiate a sale of the property; that any dealings the plaintiffs may have had in regard to the property were in behalf of prospective purchasers, unknown to defendant, and that the sale was consummated through another broker.

James A. Leary for appellants.

Gerrit Smith for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

PARK & TILFORD, Appellant, *v.* REALTY ADVERTISING
AND SUPPLY COMPANY, Respondent.

Park & Tilford v. Realty Advertising & Supply Co., 172 App. Div. 955, affirmed.

(Submitted January 10, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 21, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action in equity for the rescission of four written contracts upon the ground that they were procured by defendant by means of fraud and deceit practiced upon plaintiff. The complaint was dismissed upon the ground that plaintiff failed to establish fraud and upon the ground that the material evidence adduced by plaintiff was inadmissible as tending to contradict the terms of a written contract.

Emil E. Fuchs, George Cohen and Charles O. Maas for appellant.

Walter H. Bond for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J

JAMES M. HYDE, Appellant, *v.* NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Respondent.

Hyde v. N. Y. C. & H. R. R. Co., 173 App. Div. 990, affirmed.

(Argued January 10, 1919; decided January 28, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the third

judicial department, entered May 22, 1916, *unanimously* affirming a judgment in favor of defendant entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff while walking on one of defendant's tracks in the village of Chatham was struck by one of defendant's engines and received the injuries complained of. The complaint alleged that the engine passing easterly on the west-bound track was proceeding without the blowing of the whistle, ringing of the bell, or giving the least warning of its approach, although the plaintiff could have been seen and was seen by the defendant's servants, but the said servants recklessly, willfully, negligently and carelessly ran upon the plaintiff, without any negligence or carelessness on his part, and that he was rightfully at the place where he was struck and received his injuries. The issue submitted to the jury by the trial justice was, whether the servants of the defendant, in reckless disregard of the rights of the plaintiff, had operated the train so as to cause the accident to the plaintiff.

Leonard F. Fish and Thomas J. O'Neill for appellant.

William L. Visscher for respondent.

Judgment affirmed, with costs, under the provisions of section 1317 of the Code of Civil Procedure; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CUDDEBACK, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ANTONIO VERRINO, Appellant.

(Argued January 13, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Supreme Court rendered May 4, 1918, at a Trial Term for the county of Monroe, upon a verdict convicting the defendant of the crime of murder in the first degree.

William J. Baker for appellant.

John W. Barrett, District Attorney (Marsh W. Taylor and William F. Love of counsel), for respondent.

Judgment of conviction affirmed; no opinion.

Concur: COLLIN, CUDDEBACK, CARDOZO, CRANE and ANDREWS, JJ. Dissenting: HISCOCK, Ch. J., and POUND, J.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JOHN MADERO, Appellant.

People v. Madero, 185 App. Div. 945, affirmed.

(Argued January 13, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered October 25, 1918, which affirmed a judgment rendered at a Trial Term for the county of Erie upon a verdict convicting the defendant of the crime of keeping a house of assignation, in violation of section 1146 of the Penal Law.

Thomas L. Newton for appellant.

William W. Dickinson and Guy B. Moore for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

ALBERT SANDERS, as Receiver in Supplementary Proceedings, Appellant, v. FREDERICK F. PROCTOR, JR., Respondent.

Sanders v. Proctor, 172 App. Div. 713, affirmed.

(Argued January 13, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 27, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. The action was to recover a sum alleged to be due Wonderland Amusement Company,

as the consideration for the sale by it to defendant of 150 shares of its capital stock. The answer admitted that a certificate for 150 shares of the capital stock of said corporation was issued and subsequently delivered to the defendant, but denied that the certificate was issued at the instance and request of the defendant, and denied that he accepted the same, or that he promised and agreed to pay therefor.

Charles G. F. Wahle for appellant.

Sumner B. Stiles and *William F. S. Hart* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: *HISCOCK*, Ch. J., *COLLIN*, *CUDDEBACK*, *CARDOZO*, *POUND*, *CRANE* and *ANDREWS*, JJ.

RIVERDALE REALTY COMPANY, Appellant, v. THE CITY
OF NEW YORK et al., Respondents.

Riverdale Realty Co. v. City of New York, 173 App. Div. 967, affirmed.
(Argued January 13, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 14, 1916, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. Plaintiff, the owner of property at the corner of West Seventy-ninth street and Riverside Drive in the city of New York, brought this action to restrain the defendants from erecting and maintaining a garbage and refuse dump near the foot of West Seventy-seventh street bordering the Hudson river. Plaintiff contended that the dump when constructed and in operation would be a nuisance in fact, and that it was being constructed in violation of certain statutes and for that reason was a nuisance in law.

James R. Deering for appellant.

William P. Burr, Corporation Counsel (*Terence Farley*, *George P. Nicholson* and *John F. O'Brien* of counsel), for city of New York et al., respondents.

Allan Lee Smidt for Riverside Contracting Company, respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

CLIMAX ROAD MACHINE COMPANY, Respondent, *v.*
FORD ALLEN, Appellant.

Climax Road Machine Co. v. Allen, 172 App. Div. 915, affirmed.
(Argued January 13, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 27, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The complaint alleged the sale of a stone crusher by the plaintiff to one Jacob Rosecrans for \$300; that he agreed to pay \$100 of the purchase money in cash on the delivery of the crusher, and to give his note for \$200 for ninety days for the balance; and that the defendant guaranteed and agreed in writing that the cash payment of \$100 would be made by Jacob Rosecrans to the plaintiff as provided in the contract; that the road crusher was delivered; but that Jacob Rosecrans had neglected and failed to make the cash payment of \$100 provided for in the contract; judgment was demanded against the defendant for that amount, with interest. The answer admitted the sale and delivery of the road crusher and the terms of payment, but denied that defendant received any consideration for guaranteeing the payment of the \$100 in question, denied that Jacob Rosecrans neglected or failed to make the cash payment in question, denied that anything was due and owing from the defendant to the plaintiff, and denied each and every other allegation in the complaint contained, and alleged as a defense that Jacob Rosecrans had satisfied, paid and discharged the plaintiff's claim in full before the commencement of the action.

Edward C. Hyle for appellant.

Daniel W. Van Hoesen for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ. Dissenting: CRANE, J.

HENRY L. SPRAGUE, Appellant, *v.* WILLIAM S. WEBB
et al., Respondents.

Sprague v. Webb, 168 App. Div. 292, affirmed.

(Argued January 14, 1919; decided January 28, 1919.)

APPEAL from a judgment entered August 20, 1915, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon the report of a referee and directing a dismissal of the complaint. The action was brought to recover from defendant Webb damages for having failed to use his best efforts to carry to a successful termination a joint adventure by which plaintiff, said defendant and another sought to acquire substantially all of the capital stock of a railroad corporation. The Appellate Division held that the scheme was illegal and immoral and that the courts should not aid either party in enforcing it nor give damages for a breach or for services rendered in pursuance thereof.

Lawrence A. Sullivan for appellant.

Howard Taylor, Henry B. Anderson and Roy C. Gasser for William S. Webb, respondent.

Judgment affirmed, with costs to respondent Webb; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. GIOVANBATISTA FERRARO, Appellant.

(Argued January 14, 1919; decided January 28, 1919.)

APPEAL from a judgment of the Supreme Court, rendered March 29, 1918, at a Trial Term for the county of Cattaraugus upon a verdict convicting the defendant of the crime of murder in the first degree.

Edward J. Reilly for appellant.

Archibald M. Laidlaw, District Attorney, for respondent.

Judgment of conviction affirmed; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

THE FIRST CONGREGATIONAL CHURCH OF SCHENECTADY,
NEW YORK, Appellant, v. WILLIAM P. FAUST et al.,
Respondents.

First Congregational Church of Schenectady v. Faust, 171 App. Div. 961, affirmed.

(Argued January 15, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 22, 1913, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term without a jury. The action was brought in the name of plaintiff church for a perpetual injunction restraining the defendants from interfering with "plaintiff, its trustees and members" in the holding of services in a portion of the church building belonging to plaintiff corporation and for damages. The trial court found that the defendants, except the defendant Lunn, were, at the commencement of the action, *de facto* trustees of the plaintiff, in possession, and that the court was without jurisdiction to determine in this action who were the *de jure* trustees of the plaintiff.

Robert J. Landon for appellant.

Frank Cooper for respondents.

Judgment modified by striking therefrom the words "on the merits," and as so modified affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

GEORGE DE CARLTON, Appellant, *v.* VAUGHAN GLASER,
Respondent.

De Carlton v. Glaser, 172 App. Div. 132, affirmed.

(Argued January 15, 1919; decided February 4, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 7, 1916, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial in an action to recover for an alleged breach of contract of employment. The complaint alleged that on or about September 5, 1912, defendant employed plaintiff as a theatrical performer for a period of fifty-two weeks and promised to pay therefor; that after the 1st day of February, 1913, the defendant refused to allow plaintiff to further perform and refused to pay him any salary whatever. The answer, after certain denials, alleged as a main defense that at all the times mentioned in the complaint, and for many years prior thereto, there existed and still exists in the theatrical profession, of which the parties herein are members, a well-established and well-understood general custom and usage in the United States to the effect that either party to a theatrical contract had the right to terminate and cancel the same on two weeks' notice, which custom and usage was generally known to and uniformly acknowledged and acquiesced in by the members of said profession, of all of which the plaintiff had notice, and with reference to which and with knowledge of which custom and usage

the defendant employed the plaintiff; and the plaintiff accepted such employment with reference to such custom; that in accordance with said custom and usage the defendant did on or about the 18th day of January, 1913, notify plaintiff of his election to terminate and cancel said employment, and did pay the plaintiff his salary for the ensuing two weeks and that plaintiff thereupon consented to the termination of said employment.

Arthur F. Driscoll and Dennis F. O'Brien for appellant.

L. D. Frolich and Nathan Burkan for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ. Dissenting: HISCOCK, Ch. J., and CRANE, J.

RIVIERA REALTY COMPANY, Respondent, *v.* ILLINOIS SURETY COMPANY, Appellant.

Riviera Realty Co. v. Illinois Surety Co., 173 App. Div. 935, affirmed.

(Argued January 15, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered April 24, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The action was upon a bond given by the defendant as surety for the performance of a contract between the plaintiff and one John Barba, for the rough and finished carpenter work necessary for the erection of an apartment house known as "The Riviera" on Riverside Drive between One Hundred and Fifty-sixth and One Hundred and Fifty-seventh streets, borough of Manhattan, New York city, to recover the expense and for damages for delay alleged to have been incurred by the plaintiff as owner, due to the default of the con-

tractor in the completion of the work as called for by his contract.

A. J. Rose, L. Laflin Kellogg and Alfred C. Petté for appellant.

Sol Kohn and Mark Ash for respondent.

Judgment modified upon consent of plaintiff's counsel by deducting therefrom the sum of \$1,500 and interest thereon from February 15, 1911, to November 23, 1915, and as modified affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

WOOD HARMON WARRANTY CORPORATION, Respondent,
v. PLANDOME CONSTRUCTION COMPANY et al., Defendants,
and BARNET W. ROD COMPANY et al., Appellants.

Wood Harmon Warranty Corpn. v. Plandome Construction Co., 173 App. Div. 985, affirmed.

(Submitted January 16, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered June 2, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to foreclose a mortgage on real property. The defendants, appellants, in their answer alleged that they had entered into a contract with the mortgagor to install plumbing fixtures in the building, by the terms of which contract title to said fixtures was to remain in said contractors until fully paid for; that at the time of the commencement of this action part of the fixtures installed pursuant to said contract had not been paid for and prayed that it be decreed that the plaintiff has no right, title or interest whatsoever in the plumbing fixtures installed in the premises described in the complaint by reason of the mortgage held by it and that title to said plumbing fixtures was vested and remained in the defendants, appellants.

Jacob R. Schiff for appellants.

Albert A. Hovell, Harry W. McChesney and Isaac Roth for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

EDWARD E. YOUNG, Respondent, *v.* INTERNATIONAL
MOTOR COMPANY, Appellant.

Young v. International Motor Co., 175 App. Div. 949, affirmed.

(Argued January 16, 1919; decided February 4, 1919.)

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 18, 1916, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. It appeared that while plaintiff was riding in a carriage it was struck by a motor truck driven by one Bowman, who was in the general employment of the defendant and was sent by the defendant to deliver a motor truck to Winfield Pugsley at Peekskill, and to remain there for a week to demonstrate the truck and show Pugsley's man how to operate it, in pursuance of an agreement made between Pugsley and the defendant at the time Pugsley executed the contract for the purchase of the motor truck from the defendant. It was admitted that the truck was brought to Peekskill by Bowman as a servant of the defendant, but defendant contended that after he delivered the truck to Pugsley the relationship of the parties changed and he, thereupon, became the servant of Pugsley, so that Pugsley and not the defendant became chargeable with responsibility for Bowman's negligent act.

Frederick W. Catlin and Robert H. Woody for appellant.

James W. Husted for respondent.

Order affirmed and judgment absolute ordered against

appellant on the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

LOUIS A. FISCHER, Appellant, *v.* JOHN JOHNSON,
Respondent.

Fischer v. Johnson, 172 App. Div. 932, affirmed.

(Argued January 16, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered March 3, 1916, affirming a judgment in favor of defendant entered upon an order of Special Term sustaining a demurrer to and directing a dismissal of the complaint. Plaintiff, claiming to be a creditor of one Youngmann, sought an injunction restraining the defendant from distributing the moneys received on the sale of Youngmann's property until the claim of the plaintiff against said Youngmann was lawfully determined and demanded that the court determine the validity of plaintiff's claim and of all the other claims of creditors against Youngmann, and having so determined the claims, to direct distribution of said moneys *pro rata* among Youngmann's creditors. The court, at Special Term, held that Youngmann had simply agreed with some of his creditors that he would permit the sale of his goods by a trustee and the *pro rata* distribution of the fund among these creditors; that he had a right to pay them what he owed them; or to pay a group of them a part that he owed them, and, in the absence of a bankruptcy proceeding, there was no way that the plaintiff could prevent the consummation of that purpose.

Morey C. Bartholomew for appellant.

Thomas R. Wheeler for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

THE LONG ISLAND RAILROAD COMPANY, Respondent, *v.*
AMERICAN BRIDGE COMPANY OF NEW YORK et al.,
Appellants.

Long Island R. R. Co. v. American Bridge Co., 175 App. Div. 170,
affirmed.

(Argued January 16, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 29, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court in an action to recover upon a contract of indemnity. Defendant had contracted with plaintiff to erect a certain bridge and save plaintiff harmless from liability for injuries to persons or property due to its carrying out the work. An employee of a subcontractor while in the performance of his duty was struck by one of plaintiff's trains and received injuries for which he recovered a verdict against said plaintiff who in turn sues the defendant to recover the amount thereof.

*William W. Corlett, George Denny and Charles Mac-
Veagh* for appellants.

William C. Beecher and Joseph F. Keany for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, POUND,
CRANE and ANDREWS, JJ. Not voting: CARDOZO, J.

BARBARA KERN, Respondent, *v.* MARTIN STUCZKEWICZ,
Appellant.

Kern v. Stuczkewicz, 173 App. Div. 920, affirmed.

(Argued January 17, 1919; decided February 4, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered April 6, 1916, *unanimously* affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence

of defendant. Plaintiff tripped and fell over certain iron doors in the sidewalk in front of defendant's premises. It was shown that they were defective. Defendant contended that the continuous possession and control of the entire property under two leases had been in two tenants for more than six years prior to the accident, and that, therefore, the owner could not properly be held liable as a matter of law for the plaintiff's injuries.

John M. Stull for appellant.

Hampton H. Halsey for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

EMMA G. BADGELEY, Appellant, v. CENTRAL CONSUMERS
WINE AND LIQUOR COMPANY, Respondent.

Badgeley v. Central Consumers Wine & Liquor Co., 175 App. Div. 932, affirmed.

(Argued January 20, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 8, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. The action was brought to recover on five causes of action, for rent, and in the alternative, for use and occupation and for taxes and water rents. The complaint alleged the execution of a lease by the plaintiff to Norma G. Moss and Mary G. Cronin for a term of twelve years from the first day of August, covering premises 800 Seventh avenue, in the city of New York; that the said tenants entered into possession; that the defendant brought an action to foreclose the mortgage which it held upon the lease in question; that in pursuance of a final judgment entered in said foreclosure action the leasehold premises were sold at public auction to the defendant and that the defendant entered into possession and occupied the

premises under the terms and conditions of the lease and was in occupation of the same at all times up to and including the month of November, for the rent of which month suit was brought, as well as for taxes accruing on that day and for water rents. The complaint also contained a cause of action for damages for alterations alleged to have been made by the defendant in the premises. The answer of the defendant admitted the execution of the lease, of the mortgage thereon and of the foreclosure of the mortgage, but denied that the defendant purchased the leasehold estate, sold pursuant to the judgment of sale in the foreclosure action, denied that it entered into possession of the premises and occupied the same, and put in issue the other allegations of the complaint.

Abram I. Elkus, Joseph M. Proskauer, A. W. Bailey and Henry T. Randall for appellant.

Arthur B. Hyman for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

LEO L. D'UTASSY, Respondent, *v.* SOUTHERN PACIFIC COMPANY, Appellant.

D' Utassy v. Southern Pacific Co., 174 App. Div. 547, affirmed.

(Argued January 20, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 11, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. Plaintiff's assignor delivered to the defendant as a common carrier for hire forty-five bales of cotton consigned to New Orleans, La. The answer admitted the non-delivery of the cotton; and its value and ownership and the assignment of the claim to the plaintiff were duly proven. It appeared that the defendant and its connecting carriers had duly transported this cotton as far as Houston, Tex.; that at Houston, Tex. the cotton

was in the actual possession of the Galveston, Harrisburg and San Antonio Railroad Company, the connecting carrier, which delivered the cotton to the Cleveland Compress for compressing by it as the agent of the defendant and as a part of contract of carriage; and that the cotton was destroyed by fire while in the compress without negligence on the part of the defendant or of the compress company. Plaintiff contended that the defendant was at the time of the loss of the cotton under the common-law liability of an insurer, inasmuch as neither the tariffs nor the bill of lading under which the shipment moved in any way limited the defendant's liability for the loss.

J. Ard Haughwout and *Everett J. Esselstyn* for appellant.

Arthur W. Clement and *Wilson E. Tipple* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CHASE, COLLIN, CUDDEBACK, HOGAN and CRANE, JJ. Not sitting: HISCOCK, Ch. J., and McLAUGHLIN, J.

JACOB W. REED, Appellant, *v.* RAY REED, Respondent,
Impleaded with Another.

Reed v. Reed, 175 App. Div. 165, affirmed.

(Argued January 20, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 22, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term. The action was brought by Jacob W. Reed, the plaintiff, against Ray Reed, his wife, and the Kings County Savings Institution to recover certain moneys in said savings institution in the name of the defendant, Ray Reed, and the claim was made that said moneys were the property of plaintiff. The defendant, Ray Reed, denied the ownership of the plaintiff in said moneys, and pleaded that they were her property.

Charles E. Kelley and *William W. Taylor* for appellant.
William F. Hagarty for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

BABETTA WACHSMAN et al., Respondents, v. TRAVELERS' INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant.

Wachsmann v. Travelers' Ins. Co. of Hartford, Conn., 175 App. Div. 981, affirmed.

(Submitted January 21, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 26, 1916, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court in an action upon a policy of indemnity insurance against loss suffered by reason of liability imposed by law in damages on account of bodily injuries accidentally sustained including death at any time resulting therefrom by reason of the ownership, maintenance, occupation and use of the premises of the assured, and while within or upon the premises 279 East Fourth street, New York city, or upon the sidewalks or other ways immediately adjoining the said premises. A child of one of plaintiff's tenants while standing in front of said premises was struck by a piece of the cornice which fell from the building and received injuries resulting in death. Her parents recovered a judgment against plaintiff, who seeks in this action to recover the amount paid together with legal expenses from the defendant.

William J. Moran for appellant.

Morris A. Robinovitch for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

ELLA HEFLIN, Respondent, *v.* FREDERIC E. LYFORD,
Appellant.

Heflin v. Lyford, 176 App. Div. 923, affirmed.

(Argued January 21, 1919; decided February 4, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 18, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover loss alleged to have been occasioned plaintiff by her purchase of worthless bonds induced by false representations of the defendant.

Harvey D. Hinman for appellant.

James Moore for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

ABRAHAM GOLDINGER, Respondent, *v.* ANNIE BAUMANN,
Appellant.

Goldinger v. Baumann, 176 App. Div. 166, affirmed.

(Argued January 21, 1919; decided February 4, 1919.)

APPEAL from a judgment, entered December 21, 1916, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term and directing judgment in favor of plaintiff for the relief demanded in the complaint which alleged that theretofore defendant had entered into a written contract to sell certain real property to plaintiff who thereupon paid a deposit on the purchase price; that by the said contract she agreed to convey the said property free from incumbrances or violations or complaints filed or existing in any municipal department; that at the time for passing title complaints of violation of the Tenement House Law had been filed with the tenement house department whereupon plaintiff refused to accept title and in this

action demanded judgment for the amount of his deposit together with expenses of search. The question at issue was the construction to be placed upon the words "violations and complaints," contained in the contract of sale and furnishing the ground for the refusal of the plaintiff to accept the title tendered by the defendant.

Arthur Butler Graham, Victor F. Nekarda and Howard J. MacLachlan for appellant.

Reuben Stone for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

THE FIRST NATIONAL BANK OF SEATTLE, Respondent, v.
HERMAN M. GIDDEN, Appellant.

First Nat. Bank of Seattle v. Gidden, 175 App. Div. 563, affirmed. (Argued January 21, 1919; decided February 4, 1919.)

APPEAL from a judgment entered January 12, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and directing judgment in favor of plaintiff. A corporation in Seattle sold and shipped to defendant 4,000 cases of salmon, at the same time drawing a draft for the amount of the purchase price, which it sold to plaintiff with the bill of lading attached. The draft with the attached bill of lading was sent to the Irving National Bank for collection and after some negotiations, resulting in an extension of time for payment, was accepted by defendant. On the day of maturity defendant sent to the Irving National Bank a certified check for the amount of the draft but neither it nor the warehouse receipt could be found and the check was brought back, the draft remaining unpaid. The next day the draft was found but defendant refused to pay. This action was brought to recover the difference between the amount thereof and the price for which the

salmon was subsequently sold. The trial court dismissed the complaint on the ground that the defendant, under his contract for the purchase of the salmon and the terms of his acceptance of the draft, was entitled to the delivery of the salmon on the day of maturity of his acceptance, and the goods, or the documents representing them, not having been delivered to him on that day he was discharged from his liability on the draft. The Appellate Division reversed on the ground that the bill of lading and warehouse receipt for the salmon were held by the plaintiff as collateral security only; that when the defendant accepted the draft he became obligated to pay it, irrespective of the collateral; and that the failure to surrender the collateral was not a defense to an action on the acceptance.

Frank Wasserman for appellant.

Louis F. Doyle for respondent.

Judgment affirmed, with costs, on opinion of McLAUGHLIN, J., below.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN and CRANE, JJ. Not sitting: McLAUGHLIN, J.

ARTHUR T. GOODENOUGH, Respondent, *v.* NEW YORK, WESTCHESTER AND BOSTON RAILWAY COMPANY et al., Appellants.

HENRY A. SIEBRECHT, Respondent, *v.* NEW YORK, WESTCHESTER AND BOSTON RAILWAY COMPANY et al., Appellants.

ALBERT WADLEY, Respondent, *v.* NEW YORK, WESTCHESTER AND BOSTON RAILWAY COMPANY et al., Appellants.

Goodenough v. N. Y., Westchester & Boston Ry. Co., 173 App. Div. 948, affirmed.

Siebrecht v. N. Y., Westchester & Boston Ry. Co., 173 App. Div. 950, affirmed.

Wadley v. N. Y., Westchester & Boston Ry. Co., 173 App. Div. 950, affirmed.

(Argued January 21, 1919; decided February 4, 1919.)

APPEAL, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court

in the second judicial department, entered July 12, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The actions were to restrain the defendant from operating its railroad through certain lands in the city of New Rochelle in violation of restrictive covenants of record. The judgment in each case provided that the railway company should be enjoined and restrained from maintaining the embankment on certain lots in the Sickels tract owned by it, and from operating trains over the same, with a proviso that upon paying the plaintiff damages, with interest, it should be relieved from the said injunction and entitled to a release from the plaintiff, his heirs and assigns, from any claim which had arisen or might arise by reason of the maintenance of the said embankment, station and other structures, or by reason of operating trains over the same.

John B. Knox and *George S. Graham* for appellants.

Richmond J. Reese for respondents.

Judgment, in each case, affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. PAUL CHAPMAN, Appellant.

Attorneys — compensation on appeal from judgment of death.

The prohibition against granting compensation to counsel for services on an appeal from a judgment of death, unless said appeal is brought on for argument within six months or the time for bringing on said argument has been enlarged by the Court of Appeals, is statutory and absolute. (*People v. Campanelli*, 214 N. Y. 37, followed.)

(Submitted January 27, 1919; decided February 4, 1919.)

APPLICATION for compensation of counsel (See 224 N. Y. 463.)

Matthew W. Wood and William R. Murphy for motion.
No one opposed.

COLLIN, J. The counsel assigned by the court for the appellant, Paul Chapman, upon his appeal to this court from a judgment convicting him of murder in the first degree, have applied for the allowance of compensation for their services and of their disbursements in prosecuting the appeal. The appeal was not brought on for argument within six months from the taking of the appeal, nor was the time for bringing on the argument enlarged by the court. Section 536 of the Code of Criminal Procedure is: "An appeal to the court of appeals may, in the same manner, be brought to argument by either party, on any day in term, and where the judgment appealed from is of death the appeal must be brought on for argument within six months from the taking of such appeal, unless the court, for good cause shown, shall enlarge the time for that purpose." Section 308-a of such Code is: "No compensation shall be allowed to counsel on an appeal from a judgment of death for services in prosecuting the appeal unless the appeal shall have been brought on for argument within the time prescribed by section five hundred and thirty-six of this code."

The counsel seek to escape the constriction of our power enacted by the section 308-a by averring that (a) the clerk of the court below did not cause the record in the case to be printed as and within the time prescribed by section 485 of the Code of Criminal Procedure; (b) the six months from the taking of the appeal expired in the month of August, one of the summer months during which this court is in recess, and (c) within the six months they and the district attorney filed with the clerk of this court a written stipulation that the argument of the appeal be adjourned to a day after the expiration of the six months. The reasons, jointly or severally considered, are not efficacious. In them is no

reason or cause why an application to this court for the order enlarging the time prescribed by section 536 could or should not have been made. The appeal was not brought to argument until nine days next following the expiration of the recess period had elapsed. The prohibition against granting the compensation is statutory and under the circumstances here is absolute. (*People v. Campanelli*, 214 N. Y. 37.) Section 308-a is, by its language, made applicable to the compensation allowable to the counsel. The compensation is distinct, however, from the personal and incidental expenses of the counsel in prosecuting the appeal. We can, therefore, and should allow those expenses.

HISCOCK, Ch. J., CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur.

Application of counsel for compensation denied, and application for expenses allowed.

GENERAL FIREPROOFING COMPANY, Respondent, *v.* THE KEEPSDRY CONSTRUCTION COMPANY et al., Defendants, NEW YORK STATE NATIONAL BANK, Appellant, and THE PEOPLE OF THE STATE OF NEW YORK, Respondent.

(Submitted January 27, 1919; decided February 4, 1919.)

Motion for re-argument denied, with ten dollars costs and necessary printing disbursements. (See 225 N. Y. 180.)

HOOKE, CORSER & MITCHELL COMPANY, Appellant, *v.* MAUDE E. HOOKE et al., Respondents.

Hooker, Corser & Mitchell Co. v. Hooker, 186 App. Div. 923, appeal dismissed.

(Submitted January 27, 1919; decided February 4, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 15, 1918, *unanimously* affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term.

The motion was made upon the ground that an appeal did not lie as of right to the Court of Appeals and that permission to appeal had not been obtained.

John Alexander for motion.

Robert J. Landon opposed.

Motion granted and appeal dismissed, with costs and ten dollars costs of motion.

HUGGINS LUMBER COMPANY, Appellant, *v.* HOMER J. PHELPS, Defendant, and EARL L. MILLER, Respondent.

Huggins Lumber Co. v. Phelps, 173 App. Div. 917, affirmed.

(Submitted January 21, 1919; decided February 7, 1919.)

APPEAL from a judgment entered March 28, 1916, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed an order of the court at a Trial Term setting aside a verdict in favor of defendant, respondent, and granting a new trial and directed the reinstatement of said verdict. The action was to recover a deficiency arising upon the foreclosure of a chattel mortgage. The defense was that the defendant, respondent, had been released by the plaintiff from all liability under the mortgage.

Claude E. Guile for appellant.

Albert T. Jennings for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ.

MOHAWK IMPROVEMENT COMPANY, INC., Respondent, *v.* MORTIMER EVEREST et al., Appellants.

MOHAWK HYDRO-ELECTRIC COMPANY, Respondent, *v.* MORTIMER EVEREST et al., Appellants.

Mohawk Improvement Co. v. Everest, 175 App. Div. 956, affirmed.

Mohawk Hydro-Electric Co. v. Everest, 175 App. Div. 956, affirmed.

(Argued January 22, 1919; decided February 7, 1919.)

APPEAL, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court

in the third judicial department, entered November 20, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to compel specific performance of a contract by which it was alleged defendant Everest agreed to take title to certain real properties and later turn them over to plaintiffs' assignor.

John T. Norton for appellants.

Fred Linus Carroll for respondents.

Judgment in each case affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

GEORGE McDONALD, Respondent, *v.* MOHAWK GAS
COMPANY OF SCHENECTADY, Appellant.

McDonald v. Mohawk Gas Co. of Schenectady, 175 App. Div. 956,
affirmed.

Argued January 23, 1919; decided February 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 16, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover damages to real property alleged to have been caused by an explosion of gas and resulting fire occurring through the negligence of defendant in permitting gas from its service pipe to escape into the cellar of plaintiff's building.

Daniel Naylor, Jr., for appellant.

John Alexander for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

CLARENCE A. JOHNSON, Respondent, *v.* SYRACUSE DRY GOODS COMPANY et al., Appellants, Impleaded with Another.

Johnson v. Syracuse Dry Goods Co., 175 App. Div. 967, affirmed.

(Argued January 23, 1919; decided February 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered November 25, 1916, affirming a judgment in favor of plaintiff entered upon a verdict in an action for conversion, the alleged result of a conspiracy by which plaintiff and certain others were induced through false representations and fraudulent concealment of the maker's insolvency, to indorse, without consideration, certain promissory notes.

Irving D. Vann and *David Paine* for appellants.

Virgil K. Kellogg and *Andrew L. Chapman* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, CUDDEBACK, HOGAN, McLAUGHLIN and ANDREWS, JJ. Dissenting: COLLIN and CRANE, JJ.

S. ANDRAL KILMER, Appellant, *v.* DR. KILMER & Co., Respondent.

Kilmer v. Dr. Kilmer & Co., 175 App. Div. 670, affirmed.

(Argued January 24, 1919; decided February 7, 1919.)

APPEAL from a judgment entered January 4, 1917 upon an order of the Appellate Division of the Supreme Court in the third judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and directing a dismissal of the complaint. The action was brought to obtain certain injunctive relief and resulted in a decision and judgment restraining the defendant corporation from receiving, opening or in any manner interfering with any and all mail received at the post office in the city of Binghamton, N. Y., or in any other place or manner, addressed in any

of the following names: Dr. S. Andral Kilmer & Co., S. Andral Kilmer & Co., S. A. Kilmer, M. D., S. Andral Kilmer, Dr. S. A. Kilmer, S. A. Kilmer & Co., S. A. Kilmer, Andral Kilmer, Andral Kilmer, M. D., Dr. Andral Kilmer, S. Kilmer, M. D., Dr. S. Kilmer, Dr. Kilmer, S. Andral Kilmer, M. D., S. Kilmer, Dr. S. Andral Kilmer; from receiving, opening or in any manner interfering with any letters having the word "personal" written or printed upon the envelope with the address containing Dr. Kilmer or any other title, showing that it is a physician with whom the writer intends to communicate; from using the name of the plaintiff without regard to the prefix or affix in connection with its business, upon its advertising matter, in such a way or manner as is calculated to lead the public to believe that S. Andral Kilmer is the physician connected with or in charge of the medical department of the defendant; from using the name of S. Andral Kilmer in any of its advertisements, pamphlets, circulars, labels or other advertising matter, in any place wherein the same was not actually used on March 14, 1892, as provided in the contract of that date between Jonas M. Kilmer and the said S. Andral Kilmer.

Joseph Walker Magrath and *Rollin W. Meeker* for appellant.

William Nottingham and *Theodore R. Tuthill* for respondent.

Judgment affirmed, with costs; no opinion.

CONCUR: CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

ALBERT H. DOLLARD et al., Respondents, v. CHARLES E. WHOWELL, JR., Appellant.

Dollard v. Whowell, 174 App. Div. 403, affirmed.

(Submitted January 24, 1919; decided February 7, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department,

entered August 24, 1916, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term. The action was to restrain the defendant from erecting an apartment house upon his premises adjoining those of plaintiff in alleged violation of a covenant contained in the respective deeds under which both parties derive title. Defendant contended that the character of the neighborhood had so changed since the creation of the restrictive covenants that they should not be enforced.

Michael J. Joyce for appellant.

James O. Miller and *Henry M. Dater* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

ARNOLD E. PETERSON, Respondent, *v.* MISSOURI, KANSAS
AND TEXAS RAILWAY COMPANY, Appellant.

HARRY H. KUTNER, Respondent, *v.* MISSOURI, KANSAS
AND TEXAS RAILWAY COMPANY, Appellant.

Peterson v. Missouri, K. & T. Ry. Co., 175 App. Div. 931, affirmed.

Kutner v. Missouri, K. & T. Ry. Co., 175 App. Div. 931, affirmed.

(Submitted January 24, 1919; decided February 7, 1919.)

APPEAL, in each of the above-entitled actions, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered November 21, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The complaints contained ten causes of action, each founded upon the allegation that the plaintiff was the owner and holder of a certain promissory note in writing made by the defendant on or about the 1st of May, 1913, wherein and whereby the defendant promised to pay to bearer the sum of \$1,000 with interest thereon at five per cent per annum on the 1st day of May, 1915, the amount whereof had not been paid. The answer denied that the defend-

ant made such a contract and as a separate defense alleged that in each of the notes referred to the promise to pay to bearer was not independent but was to be performed expressly under and upon the terms and conditions set forth in a certain trust agreement, which, with the notes therein referred to, formed one instrument and that in each of said notes it was provided on the face thereof that the principal amount provided to be paid should become due in the event that a default as defined in the trust agreement should happen and then should become due and payable in the manner and with the effect therein provided.

M. E. Harby for appellant.

James Garfield Moses for respondent.

Judgment in each case affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN, CRANE and ANDREWS, JJ.

EVA SHIELDS, Respondent, *v.* VAN KELTON AMUSEMENT CORPORATION, Appellant.

Reported below, 186 App. Div. 946.

(Submitted February 3, 1919; decided February 7, 1919.)

MOTION to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 31, 1918, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries.

The motion was made upon the ground that the exceptions are frivolous and the appeal taken solely for purposes of delay.

Abraham Rickman for motion.

Walter L. Glenney opposed.

Motion denied, with ten dollars costs.

GERTRUDE E. TIEDEMANN, Respondent, *v.* RUDOLPH E. TIEDEMANN, Appellant.

Tiedemann v. Tiedemann, 172 App. Div. 819, affirmed.

(Argued January 23, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered May 15, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover accrued alimony under a foreign decree of divorce and for an accounting of alleged community property. The answer set up as separate defenses: 1. That the Nevada court had no jurisdiction because the defendant had gone into the state of Nevada for the special purpose of instituting habeas corpus proceedings to secure the custody of his child, and that while he was within the state of Nevada for the purpose of prosecuting that proceeding he was served with the summons and complaint in the divorce action at a time when he was immune from service. 2. That the Nevada court had no jurisdiction because the plaintiff left the state of Connecticut and went to the state of Nevada for the express purpose of securing a divorce, and that she was not a *bona fide* resident of Nevada, not having been within that state for a period of six months. The Special Term directed an interlocutory judgment for the amount of accrued alimony and appointed a referee to take and state an account of the community property. The Appellate Division modified by directing final judgment for alimony but struck from the judgment the provision directing an accounting.

Nash Rockwood, Charles T. Lark and Homer S. Cummings for appellant.

Leo R. Brilles for respondent.

Judgment affirmed, with costs; no opinion.

Concur: CHASE, COLLIN, CUDDEBACK, HOGAN,
McLAUGHLIN, CRANE and ANDREWS, JJ.

BANQUE FRANCO-AMERICAINE, Respondent, *v.* OSCAR B. BERGSTROM et al., Copartners under the Firm Name of BERGSTROM & COMPANY, Appellants.

Banque Franco-Americaine v. Bergstrom, 171 App. Div. 870, affirmed. (Argued January 27, 1919; decided February 25, 1919.)

APPEAL from a judgment entered March 17, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which modified an order of the court at a Trial Term setting aside a verdict in favor of defendants and granting a new trial by striking therefrom the provision directing a new trial and directing the entry of final judgment in favor of plaintiff, who sued on two drafts for \$10,000, each drawn on the defendants by the Banque Alsacienne de Paris to its own order and accepted by the defendants. The defense pleaded in substance was that the drafts had been accepted and conditionally delivered by defendants; had been diverted in breach of the condition and that the plaintiff had received them with knowledge of the fraud.

John M. Coleman and *Oscar B. Bergstrom* for appellants.

Brainard Tolles, *Julien T. Davies* and *Martin A. Schenck* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ. Dissenting: CRANE, J.

JACOB ZENNER, Appellant, *v.* THE BROOKLYN HEIGHTS RAILROAD COMPANY, Respondent.

Zenner v. Brooklyn Heights R. R. Co., 173 App. Div. 194, affirmed. (Argued January 27, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 28, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for personal injuries alleged to have been sustained

through the negligence of defendant. Plaintiff, while walking across defendant's tracks on the Williamsburg Bridge Plaza in Brooklyn, was struck by one of defendant's cars and injured. The complaint was dismissed at the close of the plaintiff's case upon the specific ground that the evidence disclosed that he was guilty of contributory negligence as a matter of law.

Leonard F. Fish and *Jacob C. Brand* for appellant.

D. A. Marsh and *George D. Yeomans* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, CRANE and ANDREWS, JJ. Dissenting: CARDOZO and POUND, JJ. Not sitting: COLLIN, J.

ALFRED GEERING, Appellant, *v.* METROPOLITAN BANK,
Respondent.

Geering v. Metropolitan Bank, 170 App. Div. 751, affirmed.
(Argued January 27, 1919; decided February 25, 1919.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered December 30, 1915, which reversed an order of the Appellate Term affirming a judgment of the City Court of the city of New York in favor of plaintiff, entered upon a verdict, and granted a new trial. The action was to recover the amount of a deposit made by plaintiff with the defendant bank. The defense was that certain checks which the plaintiff had deposited in his account with defendant were forgeries or contained forged indorsements.

John Willett for appellant.

Frederick C. Tanner and *James N. Luttrell* for respondent.

Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

BROOKLYN EASTERN DISTRICT TERMINAL, Respondent,
v. THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Appellant.

Brooklyn E. D. Terminal v. Central R. R. Co. of New Jersey, 176
App. Div. 352, affirmed.

(Argued January 27, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 29, 1917, in favor of plaintiff upon the submission of a controversy under section 1279 of the Code of Civil Procedure. The plaintiff operates a union freight terminal station in Brooklyn, N. Y. The defendant is one of the trunk line railroads that avails itself of the terminal's facilities under a contract in writing, which sets forth all the rights and obligations of the parties. The controversy arose because a carload of hay shipped over the railroad's lines and consigned to one F. Williams at the terminal, was refused and not removed by the consignee. The hay was unloaded into the plaintiff's warehouses and, in compliance with the New York statute governing the disposal of refused and unclaimed freight, was stored for one year and thereafter sold at public auction (L. 1909, ch. 25, § 282). The plaintiff contended that the services rendered by it were rendered to the railroad and were outside the contract. The railroad insisted that such services as were rendered to it by the plaintiff were expressly covered by the contract and that if further or additional compensation is or was due the plaintiff it is due from the consignee or owner of the hay and not from the railroad.

Neil P. Cullom, Arthur W. Rinke and Jackson E. Reynolds for appellant.

H. B. Closson for respondent.

Judgment affirmed, with costs; no opinion

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

ROBERT ADAMSON, as Fire Commissioner of the City of New York, Appellant, *v.* CARL SCHREINER, Respondent.

Adamson v. Schreiner, 176 App. Div. 95, affirmed.

(Argued January 28, 1919; decided February 25, 1919.)

APPEAL from a judgment entered January 16, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing an interlocutory judgment in favor of plaintiff, entered upon a dismissal of the complaint by the court at a Trial Term and directing a dismissal of the complaint in an action against defendant as agent of a foreign insurance company to recover the tax prescribed by section 799 of the charter of the city of New York as amended by chapter 594 of the Laws of 1915. The question involved was whether premiums received upon contracts of reinsurance were subject to payment of such tax. The Appellate Division held that they were not.

William P. Burr, Corporation Counsel (*Terence Farley* and *John F. O'Brien* of counsel), for appellant.

Otto Horwitz and *Walter J. Rosston* for respondent.

George Richards for New York Board of Fire Underwriters, intervening.

William B. Ellison, *Bruce Ellison* and *Andrew A. Fraser* for alien property custodian, intervening.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

SISKIND RUBIN, Respondent, *v.* NEW YORK MUNICIPAL RAILWAY CORPORATION et al., Appellants.

Rubin v. N. Y. Municipal Ry. Corp., 176 App. Div. 937, affirmed.

(Argued January 28, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered February 1, 1917, affirming a judgment in favor

of plaintiff entered upon a verdict. The action was brought to recover for damage to plaintiff's property through excavations made by defendants on adjoining property, whereby the plaintiff's building, though shored up, settled so that the walls cracked and parted. Defendants contended that they had contracted with a third party to do the necessary shoring and were not liable for his failure to properly protect the plaintiff's property.

John Conway Toole for appellants.

Samuel Silbiger for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CUDDEBACK, CARDOZO, POUND and ANDREWS, JJ. Taking no part: COLLIN, J. Not sitting: CRANE, J.

THOMAS TOBIN, Appellant, *v.* THE YONKERS ELECTRIC
LIGHT AND POWER COMPANY, Respondent.

Tobin v. Yonkers Electric Light & Power Co., 173 App. Div. 365, affirmed.

(Argued January 29, 1919; decided February 25, 1919.)

APPEAL from a judgment entered June 27, 1916, upon an order of the Appellate Division of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and directing a dismissal of the complaint in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. The plaintiff was in defendant's employ, engaged in digging holes for electric light poles. While standing in a hole holding a steel drill or striking bar used for chipping rock, he received a glancing blow on the side of his head from a sledge hammer in the hands of a fellow-employee, who was engaged in striking the drill which plaintiff was holding. The case went to the jury upon the theory that the defendant was negligent in furnishing a defective tool, namely, a striking bar, the top of which was burred, mushroomed, flattened out or flanged, causing the hammer

to slip, and was further negligent in that its foreman, after being told by plaintiff that the bar was unsafe, directed plaintiff to go on working with it. The Appellate Division directed a dismissal of the complaint on the ground that plaintiff knew the condition of the drill and, therefore, assumed the risk.

Leonard F. Fish and *Thomas J. O' Neill* for appellant.

Charles J. Taylor and *Thomas H. Beardsley* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

ANNE WALCOTT, Respondent, *v.* THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, Appellant.

Walcott v. Fidelity & Casualty Co. of New York, 177 App. Div. 885, affirmed.

(Argued January 30, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 15, 1917, affirming a judgment in favor of plaintiff entered upon a verdict in an action to recover on a policy of accident insurance. The complaint alleged that the insured accidentally fell from the window of his office and received injuries resulting in his death. The defendant, by its answer, denied that the death of insured resulted from accidental causes and for a defense alleged that he committed suicide by jumping from his window to the street and that by the terms of the policy death by suicide is expressly excluded from said policy.

Edward P. Morton and *Charles C. Nadal* for appellant.

William Travers Jerome for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

ALFRED A. WHITMAN, Appellant, v. CHARLES L.
MUNNICH et al., Respondents.

Whitman v. Munnich, 175 App. Div. 946, affirmed.

(Submitted January 31, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered November 15, 1916, affirming a judgment in favor of defendants entered upon a verdict in an action upon a promissory note. Two questions were submitted to the jury: Whether or not in the inception of the note the defendants acted and relied upon false representations, fraud and deceit and false promises; and if so, whether or not plaintiff's assignors took the note in good faith without knowledge and notice of the fraud.

Maxwell C. Katz and *Otto C. Sommerich* for appellant.

Thomas Watts, *Elbert N. Oaks* and *John Bright* for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

HAROLD W. THOMAS, Respondent, v. FRED COLBATH,
Appellant.

Thomas v. Colbath, 175 App. Div. 961, affirmed.

(Argued January 31, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered November 21, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. The action was in ejectment to recover possession of certain lands under water in the village of Saranac Lake, to compel the removal of certain docks and boathouses, to restrain defendant from a continuing trespass and for damages.

Robert F. Isham for appellant.

John M. Cantwell for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

HUMBERTO SAN LUCAS et al., Appellants, *v.* BORNN & Co., et al., Defendants, and CARLOS A. BORNN, Respondent.

San Lucas v. Bornn & Co., 173 App. Div. 703, affirmed.

(Submitted January 31, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered April 11, 1917, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term in so far as it was against the defendant, respondent, and directing a dismissal of the complaint as to him. The action was brought to recover the value of certain hats delivered by the plaintiffs to Bornn & Co., a domestic corporation, and for an accounting. The answer denied the material allegations of the complaint and set up as an affirmative defense that the cause of action stated did not accrue within six years before the commencement of the action.

Abraham Rosenstein and *Jacob Friedman* for appellants.
Frederick C. McLaughlin for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., COLLIN, CUDDEBACK, CARDOZO, POUND, CRANE and ANDREWS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* DAVID ALEXANDER, Appellant, Impleaded with Others.

People v. Alexander, 183 App. Div. 868, affirmed.

(Argued February 3, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department,

entered July 11, 1918, which affirmed a judgment of the Court of General Sessions of the Peace in the county of New York rendered upon a verdict convicting the defendant of the crime of attempted grand larceny in the first degree.

Max Horowitz and Milton M. Goldsmith for appellant.

Edward Swann, District Attorney (Robert C. Taylor of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

ELIZABETH GUINEY, Appellant, *v.* TIMOTHY GUINEY, Respondent.

Guiney v. Guiney, 174 App. Div. 894, affirmed.

(Submitted February 3, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered September 25, 1916, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to procure the annulment of a marriage on the ground of fraud in that defendant concealed the fact that prior to his marriage he had committed unlawful and criminal acts. The trial court dismissed the complaint upon the ground that the evidence was insufficient to warrant annulment.

George Thoms for appellant.

No appearance for respondent.

Judgment affirmed, without costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

EUGENE L. RICHARDS, as Superintendent of Banks of the State of New York, Plaintiff, *v.* JOSEPH G. ROBIN et al., Defendants, EDMUND L. MOONEY, Appellant, and ERASTUS T. TEFFT et al., Respondents.

Richards v. Robin, 175 App. Div. 296, affirmed.

(Argued February 3, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered December 22, 1916, affirming a judgment in favor of defendants, respondents, entered upon a dismissal of the complaint as to them by the court on trial at Special Term. The trial court also dismissed a cross demand made by the defendant, appellant, against such defendants, respondents. This action was brought to enforce the statutory liability of the stockholders of the Northern Bank of New York. The appellant, Mooney, was a stockholder on the books of said bank at the time the superintendent of banks took possession of its assets, and when sued as such stockholder of record he served an answer in which he sought to recover over from the respondents, Tefft, Reeves, Carpenter and Nash, any sums which he might be forced to pay to the plaintiff in this action. The question was whether a stockholder of record, who had sold his stock at public auction and delivered the certificates indorsed in blank, could recover from stockholders who bid in the stock as brokers for an undisclosed principal, any call or assessment which he might thereafter be compelled to pay because of the fact that after the sale he continued as the stockholder of record on the books of the corporation.

William C. Fitts, Edmund L. Mooney and Charles T. B. Rowe for appellant.

Edward E. McCall, Edward B. Boies, William R. Maloney and Enos S. Booth for respondents.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ. Not sitting: CARDOZO, J.

THE PEERLESS PATTERN COMPANY, Respondent, *v.*
THE McCLURE PUBLICATIONS, INCORPORATED,
Appellant.

Peerless Pattern Co. v. McClure Publications, Inc., 176 App. Div. 913, affirmed.

(Argued February 4, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 17, 1917, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The action was brought to obtain an injunction to restrain defendant from breaching a written contract for publication in a monthly magazine known as "The Ladies World" of dress patterns. The trial court denied the prayer for an injunction but granted damages.

J. Boyce Smith, Jr., for appellant.

Frederick P. Whitaker and *Noah A. Stancliffe* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

HERMAN BRINKMAN, Appellant, *v.* JACOB CRAM,
Respondent.

Brinkman v. Cram, 175 App. Div. 372, affirmed.

(Submitted February 4, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered December 20, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury, and directing a

dismissal of the complaint in an action to recover on a judgment recovered by plaintiff's assignors March 1, 1895. The summons and complaint herein were served in January, 1916. The question was whether the original judgment, after the expiration of twenty years, is conclusively presumed to have been paid and satisfied, pursuant to sections 376 and 378 of the Code of Civil Procedure, or whether the plaintiff may invoke section 401 of the Code of Civil Procedure to extend the twenty-year limitation, by proving that, at various times during the twenty-year period, the defendant was absent from the state. It was alleged in the complaint that nothing had ever been paid on the judgment, and it was neither alleged nor proved that defendant ever made any written acknowledgment of indebtedness of any part of the amount recovered in the judgment.

Herbert G. McLear for appellant.

Edwin D. Worcester and *John Godfrey Saxe* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ. Dissenting: HOGAN, J.

HERMAN RAKOV, Appellant, *v.* BANKERS LIFE INSURANCE COMPANY OF THE CITY OF NEW YORK, Respondent.

Rakov v. Bankers Life Ins. Co. of N. Y. City, 176 App. Div. 918, affirmed.

(Argued February 4, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered January 22, 1917, affirming a judgment in favor of defendant entered upon a verdict directed by the court in an action upon a policy of life insurance. The defense was that the insured had falsely represented in her application for insurance that she had never been rejected for insurance by another company.

John F. Nash for appellant.

C. V. Byrne for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO,
POUND and McLAUGHLIN, JJ. Not voting: ANDREWS, J.

WALDORF-ASTORIA HOTEL COMPANY, Respondent, *v.*
THE CITY OF NEW YORK, Appellant.

WALDORF-ASTORIA SEGAR COMPANY, Respondent, *v.*
THE CITY OF NEW YORK, Appellant.

Waldorf-Astoria Hotel Co. v. City of New York, 177 App. Div. 907,
affirmed.

Waldorf-Astoria Segar Co. v. City of New York, 177 App. Div. 907,
affirmed.

(Argued February 4, 1919; decided February 25, 1919.)

APPEAL, in each of the above entitled actions, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 8, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. Both suits were brought to recover damages caused by the bursting of a water main on Thirty-third street about one hundred feet west of Fifth avenue early in the morning of April 13, 1914, undermining the curb wall and destroying a marble and cement floor in the Waldorf-Astoria Hotel and damaging a stock of segars stored by the segar company in the sub-basement of the hotel building. Negligence of the city was predicated upon alleged inaction, inattention and neglect of the authorities after repeated warning.

William P. Burr, Corporation Counsel (*Terence Farley* and *Willard S. Allen* of counsel), for appellant.

George C. Lay for respondent.

Judgment in each case affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO,
POUND, McLAUGHLIN and ANDREWS, JJ.

E. MOCH COMPANY, Respondent, v. THE SECURITY BANK
OF NEW YORK, Appellant.

Moch Co. v. Security Bank of New York, 176 App. Div. 842, affirmed.

(Argued February 5, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered February 14, 1917, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The action was to recover the proceeds of twenty-two checks drawn to the order of plaintiff, it being alleged that Eugene Moch, who was president of plaintiff company, received each check and without authority indorsed thereon "E. Moch Company" and thereunder "Eugene Moch" and thereafter deposited the checks to his personal account in the Fourteenth Street Bank; that said bank accepted the checks and placed the same to the credit of Eugene Moch's personal account; that said bank applied the proceeds of the checks in payment of checks drawn against said proceeds by Eugene Moch personally and thereby misappropriated the proceeds thereof to the personal use of Eugene Moch; that this application of the proceeds of said checks was without authority; and that the said Fourteenth Street Bank accepted and collected said checks with notice that the said checks and the proceeds thereof were the property of the plaintiff and with notice, putting it upon inquiry which it failed to make, which would have disclosed that the same was placed to the personal credit and account of Eugene Moch and collected, and the proceeds thereof withdrawn, paid and appropriated for the personal use of said Eugene Moch, without authority. The defenses were that the plaintiff had released Eugene Moch from all liability in connection with the checks; that the plaintiff had ratified and confirmed the transactions of Eugene Moch in connection with said checks; that Eugene Moch paid the proceeds of the checks to the

plaintiff and that the defendant had paid the proceeds of the checks to the plaintiff.

Burt D. Whedon for appellant.

William Bondy for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not voting: McLAUGHLIN, J.

LUDWIG VOGELSTEIN et al., Copartners under the Firm Name of L. VOGELSTEIN & Co., Appellants, v. POPE METALS COMPANY, Respondent.

Vogelstein v. Pope Metals Co., 177 App. Div. 884, affirmed.

(Argued February 5, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 9, 1917, affirming a judgment in favor of defendant entered upon a verdict directed by the court. Plaintiff's assignor agreed to sell to defendant certain tin to be delivered. Defendant thereafter having failed to provide certain margins demanded by plaintiff's assignor, the latter sold the tin which defendant had agreed to purchase under the rules of the New York Metal Exchange. This action was brought to recover the resulting deficiency in price.

Alfred G. Reeves and *William P. Dalton* for appellants.

Harry Edwards for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

GEORGE R. READ & COMPANY, Appellant, v. HENRY C. STURGES, Respondent.

Read & Co. v. Sturges, 176 App. Div. 657, affirmed.

(Argued February 5, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered March 6, 1917, upon an order of the Appellate Division of the Supreme Court

in the first judicial department, reversing a judgment in favor of plaintiff entered upon a verdict directed by the court and directing a dismissal of the complaint in an action to recover commissions as real estate broker for leasing real property belonging to defendant. The Appellate Division dismissed the complaint on the grounds that the plaintiff failed to show that it had been employed by the defendant; that in the only negotiations in which it participated it represented the proposed purchaser and acted in his interest; that even if the plaintiff had represented the defendant, it did not produce a person able to carry out the contract and hence able to perform the conditions necessary to entitle him to demand a lease; that the contract required the performance of personal services by a third party as well as the person whom plaintiff produced, and a specific performance thereof could, therefore, not be enforced; that as the party it produced was not financially able to carry out the contract, an action for damages would be of no avail.

M. Linn Bruce for appellant.

John C. O'Connor for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

JOHN L. SNEDDEN, Respondent, *v.* CENTRAL VALLEY NATIONAL BANK, Appellant.

Snedden v. Central Valley Nat. Bank, 173 App. Div. 970, affirmed. (Argued February 5, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered June 3, 1916, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. The action was brought to recover the balance of a deposit made in defendant bank by Power Development Com-

pany, a corporation, plaintiff's assignor. The defendant admitted receipt of the deposit, sought to justify retention of the balance on the ground that the power company wrote a letter to a third person, which letter defendant claimed gave it the right to appropriate the corporate funds to the payment of an individual indebtedness of said third person.

Charles H. Tuttle and Martin A. Schenck for appellant.
Reid L. Carr for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

DAVID L. MAITLAND, Respondent, *v.* THE CITY OF
WATERTOWN, Appellant.

Maitland v. City of Watertown, 177 App. Div. 950, affirmed.
(Argued February 6, 1919; decided February 25, 1919.)

APPEAL from a judgment, entered March 30, 1917, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department, which reversed a judgment in favor of defendant entered upon an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directing a dismissal of the complaint and directed reinstatement of said verdict in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant, his employer. Defendant was engaged in blasting rock preparatory to the construction of a bridge. The blasts were discharged by electricity conveyed by wires strung along the ground. Defendant while in the performance of his duties caught his foot in one of these wires and was thereby thrown into a pit receiving the injuries complained of.

H. D. Bailey for appellant.

Thomas Burns and Melvin F. Kinkley for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

WILLIAM E. LEE, Respondent, *v.* ERIE RAILROAD COMPANY, Appellant.

Lee v. Erie R. R. Co., 173 App. Div. 75, affirmed.

(Submitted February 6, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the third judicial department, entered May 19, 1916, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover for the alleged conversion of a quantity of lath. The defense was that the plaintiff never became entitled to delivery of said lath inasmuch as a car service charge of one dollar accrued on said shipment before the freight was paid, which said charge plaintiff refused to pay and never paid, and which car service charge was a lien on said property; that under the car service rules under which defendant was operating, it was entitled to hold said lath and to refuse to deliver the same until such car service charge was paid.

Henry B. Collin for appellant.

Thomas M. Losie for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

JOHN B. KETTELL, Appellant, *v.* ERIE RAILROAD COMPANY, Respondent.

Kettell v. Erie R. R. Co., 176 App. Div. 430, affirmed.

(Argued February 6, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 6, 1917, affirming a judgment in favor of

defendant entered upon a verdict directed by the court in an action to recover for personal injuries alleged to have been sustained by plaintiff through the negligence of defendant. Plaintiff was a passenger on one of defendant's trains in the state of New Jersey. As the train approached the station at Rutherford its speed was reduced and one of the trainmen announced the station in the car in which the plaintiff was sitting. The plaintiff arose from his seat and walked toward the rear door and stepped outside upon the platform of the car, taking hold of the car rail with his right hand. He testified that he had a large bundle in his left hand and a small bundle under his right arm. As he was about to step down, and while the train was still moving, it gave a jerk, and the plaintiff fell down the steps of the car and received the injuries complained of. It was shown that a statute of New Jersey provided that a railroad would not be liable for injury to passengers who went upon the platform of cars in violation of posted regulations of the company. It also appeared that the defendant has posted notices forbidding passengers going on the platforms of cars while the train was in motion.

Sydney A. Syme for appellant.

William C. Cannon and *Harold W. Bissell* for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, POUND, McLAUGHLIN and ANDREWS, JJ. Dissenting: CARDOZO, J.

PRISCILLA CHRZANOWSKA, Appellant, *v.* THE CORN EXCHANGE BANK, Respondent.

Chrzanowska v. Corn Exchange Bank, 173 App. Div. 285, affirmed. (Argued February 6, 1919; decided February 25, 1919.)

APPEAL, by permission, from a judgment entered December 29, 1916, upon an order of the Appellate Division of the Supreme Court in the first judicial depart-

ment, which reversed a determination of the Appellate Term affirming a judgment of the City Court of the city of New York in favor of plaintiff and directed judgment in favor of defendant. Plaintiff deposited and had credited to her account in the defendant bank a check drawn to her order by another depositor of the bank. It transpiring that the drawer of the check was dead before the deposit was made the defendant refused to pay the amount to the plaintiff and this action was brought to recover.

Alex B. Greenberg and Morris Leight for appellant.

Spotswood D. Bowers and John J. Halpin for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ.

PETER JENSEN, Respondent, *v.* CAULDWELL WINGATE COMPANY, Appellant.

Jensen v. Cauldwell Wingate Co., 171 App. Div. 948, affirmed.

(Argued February 7, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered March 2, 1916, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict in an action to recover for personal injuries alleged to have been sustained through the negligence of defendant. The plaintiff was injured while working upon a building under construction by the defendant, a general contractor. He was employed by a subcontractor, the Atlantic Terra Cotta Company, as an expert fitter of terra cotta, it being his duty to assist and advise the employees of the defendant, who were engaged in setting the terra cotta furnished by the terra cotta company. He was injured by the fall of a plank upon which he attempted to walk from the second floor of the building under construction to a platform bridge erected over the sidewalk. It was alleged that the plank was furnished by

the defendant for the use of its employees and the plaintiff as a runway to pass to and fro from the bridge to the second floor of the building.

William Dike Reed, William B. Shelton and Leondias Dennis for appellant.

Thomas D. Thacher and Adrian L. Foley for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, POUND and ANDREWS, JJ. Not sitting: McLAUGHLIN, J.

MILTON L. FLEMING, Respondent, *v.* WILLIAM M. BARRETT, as President of the ADAMS EXPRESS COMPANY, Appellant.

Fleming v. Barrett, 176 App. Div. 892, affirmed.

(Argued February 7, 1919; decided February 25, 1919.)

APPEAL from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered January 22, 1917, affirming a judgment in favor of plaintiff entered upon a verdict. Plaintiff, as agent for the defendant express company, issued certain money orders for himself, payable to his bank, paid for the same and placed the money in an envelope for transmission to the company. When the train was coming in plaintiff took this envelope together with other matter and stepped on to the platform to deliver the same to defendant's messenger. He was there assaulted and robbed. The bank was instructed by defendant to return the money orders to plaintiff and thereafter one of its agents took possession thereof, without plaintiff's consent, and delivered them to defendant. This action is to recover for their conversion.

George W. Smyth and John J. Monahan for appellant.
James E. Carroll for respondent.

Judgment affirmed, with costs; no opinion.

Concur: HISCOCK, Ch. J., HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ. Not voting: CHASE, J.

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ACCOUNTING.

See *Gray v. Heinze* (Mem.), 646; *Matter of Farmers' Loan & Trust Co.* (Mem.), 666; *Matter of Hoes* (Mem.), 670; *San Lucas v. Bornn & Co.* 717

ALIMONY.

See *Tiedemann v. Tiedemann* (Mem.), 709.

APPEAL.

1. *Construction of Constitution must be necessarily involved to warrant appeal for that reason, without permission to Court of Appeals, under section 190 of Code of Civil Procedure.* An appellant, who relies upon the provision of the Code permitting as of right appeals where a constitutional question is involved (Code Civ. Pro. § 190, as amd. by L. 1917, ch. 203) as an authority for his appeal assumes the burden of presenting a record which establishes that such construction has been not only directly but necessarily involved in the decision of the case. If the decision was or may have been based upon some other ground, the appeal will not lie. *Matter of Haydon v. Carroll.* 84

2. *Where affirmance by Appellate Division was based on discretionary power, appeal to Court of Appeals will be dismissed.* Where, upon examination of the opinion of the Appellate Division (Code Civ. Pro. § 1237) upon an appeal, taken without permission from an order of that court unanimously affirming an order of Special Term which denied a mandamus to the clerk of the Special Sessions to permit the petitioner's counsel to inspect an indictment, it appears that the affirmance was based upon the exercise of a discretionary power, the appeal will be dismissed without consideration of the merits. *Id.*

3. *Order of Appellate Division reversing a judgment of conviction and ordering a new trial "for errors of law only" cannot be reviewed in Court of Appeals — Order should show that decision was upon weight of evidence.* The Court of Appeals cannot review an order of the Appellate Division reversing a judgment of conviction and ordering a new trial, where it is stated that such reversal is "for errors of law only." A convicted defendant has the right to have the Appellate Division review and render its decision upon the facts, but the statement that the reversal is for errors of law only does not establish that the Appellate Division has awarded him that right. In such case the appeal should be dismissed, but without prejudice to a new application to the Appellate Division for the amendment and resettlement of its order by stating, in it, its decision upon the weight of evidence. *People v. Redmond.* 206

4. *Habeas corpus — Constitutional law — Special proceedings — Writ to inquire into the detention of one imprisoned, or held in custody, for a crime, is a civil, not a criminal, process, a special proceeding to enforce a civil right — Order dismissing a writ not appealable as involving a constitutional question.* A writ of habeas corpus to inquire into the detention of one confined in a prison under conviction and sentence is a civil, not a criminal, proceeding, classified by the Code of Civil Procedure as a state writ (§ 1991) and as a civil special proceeding (§§ 3333-3337, 3343, subd. 20) to enforce a civil right, although its purpose is to effect the release of the person from imprisonment or custody under a criminal prosecution. Where an order of a County

APPEAL — *Continued.*

Court dismissing a writ of habeas corpus and remanding the relator has been unanimously affirmed by an order of the Appellate Division an appeal cannot be taken to the Court of Appeals unless the appeal involves the construction of the Constitution of this state or of the United States (Code Civ. Pro. § 190), and where the appellant avers that he is held in imprisonment by virtue of a sentence and judgment which the court had not the power to render and which is, therefore, void, but the appeal involves only the determination of the meaning and not the validity of the statutes conferring jurisdiction upon the court, and does not present the constitutionality of the statutes in question or the construction of the Constitution of the state, such appeal must be dismissed. *People ex rel. Curtis v. Kidney.* 293

5. *Reversal by Court of Appeals of order of Appellate Division reversing on law leaves facts as found by jury unaffected.* The Appellate Division having reversed the judgment of the Trial Term solely upon the ground that plaintiff had failed to establish actionable negligence on the part of the defendant, the determination was equivalent to an express reversal on the law and affirmance on the facts. The conclusion of this court that the reversal upon the law was error leaves the facts found by the jury favorable to plaintiff, unaffected by the order of reversal. *Gilhooley v. Burgard.* 445

6. *Appeal may not be taken of right to Court of Appeals from order of Appellate Division directing final judgment.* In actions, except where a new trial is ordered, no appeal as of right may be taken to the Court of Appeals except from a final judgment. Such an appeal may not be taken from the order of the Appellate Division directing such a judgment; but upon an appeal from a judgment the appellant may in his notice state that he appeals from it or from a specified part thereof. (Code Civ. Pro. § 1300.) *Morgan v. Sanborn.* 454

7. *When power of Court of Appeals to review on the evidence is not defeated by unanimous decision of Appellate Division.* When a defendant's motion for a nonsuit is granted after a special verdict in favor of plaintiff and the Appellate Division unanimously reverses the judgment entered thereon and grants judgment on the special findings of the jury, the reversal of the judgment is reviewed in this court on the evidence and not on the special findings. The power of the Court of Appeals to review on the evidence is not defeated even by the unanimous decision where the exceptions to rulings on evidence and to the charge of the court sufficiently present the question whether the special verdict rests on a foundation of legal error. *Deyo v. Hudson.* 602

8. *Not authorized direct to Court of Appeals from final judgment entered upon reversal of interlocutory orders.* An appeal cannot be taken direct to the Court of Appeals from a final judgment entered after a reversal by the Appellate Division of interlocutory orders of Special Term. Section 1336 of the Code of Civil Procedure does not apply. *Noble v. Kendall* (Mem.). 673

See *Hudson Navigation Co. v. Union Trust Co.* (Mem.), 636; *Rudiger v. Coleman* (Mem.), 662; *Leopold v. City of New York* (Mem.), 663; *Logan v. Guggenheim* (Mem.), 664; *Kennedy v. Natl. Jewelers Bd. of Trade* (Mem.), 664; *Preston v. Pennsylvania R. R. Co.* (Mem.), 665; *Hooker, Corser & Mitchell Co. v. Hooker* (Mem.), 702; *Shields v. Van Kellon Amusement Corp.* (Mem.), 708.

Compensation of attorney on appeal from judgment of death.

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Non-unanimous decision of Appellate Division affirming a judgment of conviction — Court of Appeals must examine record to ascertain whether there is evidence tending to support verdict of guilty.

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When judgment is reversed on questions of fact as well as on the law a new trial must be had.

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Contract for furnishing and equipping locker rooms in state capitol — assignment of such contract to bank as security for loan — state architect proper officer with whom to file assignment — trustees of public buildings must consent to such assignment — if such consent be not obtained before assignment is filed, the assignment cannot be enforced as against a subsequent mechanic's lien against contractor.

See LIENS, 8.

Assignment of interest in estate — delivery to executor in escrow — complaint alleging that executor wrongfully filed such assignment states cause of action — when failure of assignor to raise question upon judicial settlement a bar to the action — demurrers to such defense and to counterclaims when overruled — plaintiff permitted to withdraw demurrers.

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Violation of statute (Highway Law, ch. 30, § 290, subd. 3) requiring person who injures the person or property of another in operating an automobile to give his name and other facts to the injured person or a designated officer — evidence — *res gestæ* — when declaration of injured person admissible in evidence upon trial of defendant indicted for violation of said statute.

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Incorporated villages may by ordinance limit the speed of automobiles and provide that violation of ordinance is a misdemeanor punishable by a fine and imprisonment if fine is not paid — false arrest — action for false arrest of person violating such an ordinance cannot be maintained.

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BANKS AND BANKING.

1. *When province of jury to draw conclusion from testimony of experts.* While it is no longer a valid objection to the expression of an opinion by a witness that it is upon the precise question which the jury are

BANKS AND BANKING — *Continued.*

to determine, evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable it to form an accurate judgment thereon, and no better evidence than such opinions is attainable, but where the jury can form a proper conclusion after facts known only to experts have been disclosed it is its province to draw the conclusion.
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2. *Savings bank* — *Care and diligence required of bank to ascertain that person receiving money is entitled thereto.* A savings bank cannot rely in making payment solely upon the possession and presentation of the bank book of the depositor, but must exercise ordinary care and diligence to ascertain that the person receiving the money is entitled thereto. The burden is upon the bank to prove this defense and a charge to the jury that the plaintiff must prove by a preponderance of evidence that the bank failed to exercise the ordinary care which it was required to under the circumstances of the case
Id.

3. *Whether clerks in bank exercised care and were reasonably prudent question for jury.* A witness who had qualified as an expert was asked "whether or not, in your opinion, if a depositor opens an account in her name as 'Ernestine' somebody or other, and a draft is presented signed 'Ernestina' somebody or other, purporting to come from her, that circumstance would tend to excite suspicion in the mind of the ordinarily competent signature clerk?" Over objection and exception the witness answered: "In my opinion it would not excite any suspicion." *Held*, error; that it was for the jury to say whether the clerks of the bank exercised care and whether, if reasonably prudent, they should have been suspicious. Questions to the effect whether it would excite suspicion in the mind of an ordinarily competent test clerk that several withdrawals were made within a short period on an account on which there had been no previous withdrawals or where the whole of an account was withdrawn under like conditions were improperly allowed.
Id.

See Geering v. Metropolitan Bank (Mem.), 711; Snedden v. Central Valley Natl. Bank (Mem.), 725.

Payment of checks by bank after payment thereof stopped by drawer — in absence of ratification of such payment bank is liable therefor to the drawer.

See **BILLS, NOTES AND CHECKS.**

BENEFIT ASSOCIATIONS.

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BILL OF LADING.

Provision that goods received from private or other sidings shall be at owner's risk until "cars are attached to and after they are detached from trains" — construction and meaning of term "private or other sidings."

See **CARRIERS, 1.**

BILLS, NOTES AND CHECKS.

Payment of checks by bank after payment thereof stopped by drawer — In absence of ratification of such payment bank is liable therefor to the drawer. Plaintiff stopped payment on checks drawn on defendant, which failed to carry out the instruction, and paid the checks. While the proof showed the checks were drawn to pay an indebtedness of plaintiff to the payee, there is no evidence to show that after the

BILLS, NOTES AND CHECKS — Continued.

bank's mistake the depositor recognized or adopted the unauthorized payment in any way. In the absence of such ratification the bank was liable to the depositor, as it could not justify paying out the depositor's money without authority by showing that the recipient was justly entitled to it. *American Defense Society v. Sherman Nat. Bank.* 506

See M. C. Bee Co. v. Shoemaker (Mem.), 621; *Davies v. Missouri, K. & T. Ry. Co.* (Mem.), 624; *Gross v. Mendel* (Mem.), 633; *First Nat. Bank v. Gidden* (Mem.), 698; *Peterson v. Missouri, K. & T. Ry. Co.* (Mem.), 707; *Banque Franco-Americaine v. Bergstrom* (Mem.), 710; *Whitman v. Munnich* (Mem.), 716; *Moch Co. v. Security Bank* (Mem.), 723; *Chrzanowska v. Corn Exchange Bank* (Mem.), 728.

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BROKERS.

When real estate broker who has negotiated a sale entitled to his commissions — construction of contract providing that broker should receive his commissions on installments as paid by purchaser — extensions of time to complete contract of sale — broker's claim for commissions on unpaid installment — question whether delay was caused by seller or purchaser for jury.

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Substantial performance — *quantum meruit*.

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Stock subscriptions — construction of agreement proposed to be entered into by a syndicate composed of subscribers of bonds to be issued to build a proposed railroad and the railroad promoters as managers of the proposed syndicate — when such agreement signed by only one subscriber for bonds does not authorize promoters to borrow moneys on strength of such subscription — when subscriber who is not liable for such loan may have agreement and subscription canceled.

See CONTRACT, 11.

CARRIERS.

1. *Bill of lading* — *Provision that goods received from private or other sidings shall be at owner's risk until "cars are attached to and after they are detached from trains"* — *Construction and meaning of term "private or other sidings."* Where it is provided by a bill of lading that property "received from or delivered on private or other sidings, wharves, or landing shall be at owner's risk until the cars are attached to and after they are detached from trains," the purpose of such provision is to limit the liability of the carrier by fixing definitely a time when owner's risk terminates and carrier's risk begins. The words "or other" following the word "private" are restricted to the same kind of sidings and include not all sidings but only sidings like private sidings. Where merchandise was loaded by plaintiffs under such a bill of lading into a car standing on a side track in front of their warehouse, which track had been constructed by the defendant railroad company on its own land in front of a number of warehouses, including that of the plaintiffs, for the reception of goods from, and delivery to, such warehouses, and before the car, upon which the merchandise was loaded, had been attached to a train the merchandise

CARRIERS — Continued.

was taken therefrom, the plaintiffs cannot, under the terms of the bill of lading above quoted, recover from the defendant the value of such merchandise. *Bere v. Erie R. R. Co.* 543

2. *Common-law rule as to charges of carrier — Right to recover excess charges may be waived.* It is a rule of the common law that a common carrier should charge, in a particular case, a reasonable compensation for the carriage or service rendered. It also authorizes an action at law by the injured shipper or consignee to recover moneys paid, under protest or duress of goods, as exorbitant or unreasonable charges. The right to recover the moneys may, however, under the laws of this state be waived by a voluntary payment. *Murphy v. N. Y. Central R. R. Co.* 548

3. *Public Service Commissions Law — Effect of ruling by commission that charges exacted by carrier were unreasonable.* The requirements of the Public Service Commissions Law (Cons. Laws, ch. 48, §§ 26, 28, 29, 40, 48, 49 and 57) are merely declaratory of the common law and mandatory that a rate or charge fixed by law or by the commission shall not be exceeded, and authorize the commission, upon a complaint, to investigate any illegal act done or omitted to be done and require the carrier complained of to satisfy the cause of complaint in whole or to the extent which the commission may require, but the commission may not, as the result of an investigation, fix, by a finding, or a resolution or an order, to be proof in the courts of the ultimate fact to be determined, that a complainant is entitled to recover from the carrier a designated sum for and on account of exaction by the carrier of unjust and unreasonable charges. *Id.*

4. *When excess above reasonable rate not true measure of damages.* A determination of the public service commission at a particular time that a rate is unreasonable and the fixing of a reasonable rate is not a determination that the destroyed rate has been unreasonable throughout its existence or for any certain part of its existence or that its excess above the reasonable rate can be measured for any certain time by the difference between the two rates or is it the true measure of the damages sustained by the exaction. *Id.*

5. *Excess charges paid without objection or protest cannot be recovered.* Where track storage charges for cars conveying intrastate shipments, delivered to plaintiffs made by defendant railroad company, pursuant to and in accordance with schedules filed by it with the public service commission, were paid by plaintiffs and thereafter plaintiffs filed with the public service commission a complaint that the charges were unjust and unreasonable and the commission, after a hearing, adopted a resolution to the effect that the plaintiffs were entitled to recover from the defendant the charges upon the ground that they were unreasonable and unjust exactions, and the defendant refused to pay such charges, the plaintiffs cannot recover them in an action where neither any allegation nor finding discloses any objection or protest against the charges, other than the complaint filed with the public service commission. *Id.*

See D' Utassy v. Southern Pacific Co. (Mem.), 694.

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Labor Law — provision prohibiting employment of children under the age of fourteen years — employer equally liable whether child is employed by himself or his agents — must employ reasonable supervision to prevent violation of statute — legislature had power to make violation of statute a criminal offense and provide for punishment by fine.

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§§ 190, 191 — Order of reference cannot be reviewed on appeal from final judgment.

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§§ 723, 724 — Provisions not intended to affect substantial rights of parties.

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COMMISSIONS.

Brokers — When real estate broker who has negotiated a sale entitled to his commissions — Construction of contract providing that broker should receive his commissions on installments as paid by purchaser — Extensions of time to complete contract of sale — Broker's claim for commissions on unpaid installment — Question whether delay was caused by seller or purchaser for jury. To earn his commissions a broker must accomplish what he undertook to do in his contract of employment. Yet, even failing to do so, if he produces a buyer with whom the owner is satisfied and who contracts with the owner at a price and upon terms satisfactory to the latter, the broker is entitled to compensation. A failure to complete thereafter, whether due to the fault of the buyer or of the seller, will not deprive him of them. But by their contract the parties may vary this rule to any extent. A sale of real property was negotiated by plaintiff, a real estate broker, under an agreement fixing his commissions at a certain percentage if the sale should be completed for a certain price. The buyer wishing to pay the purchase price in installments, the plaintiff and the owner, the defendant herein, before any binding contract of sale with the buyer was executed, made another agreement, reciting that the former had negotiated the sale and that the plaintiff's commissions should be a certain percentage of the purchase price "payable pro rata from each installment of the purchase price as and when the same is received," the final installment to be due when the final cash payment and a bond and mortgage securing the balance was turned over, no commission to be earned until the purchaser signed a contract of sale, and if for any cause he terminates the contract the plaintiff's right to further commissions terminates also. Held, that there was a consideration for such agreement. After

COMMISSIONS — Continued.

the execution of the contract of sale the buyer made a small payment on the purchase price on which the plaintiff received his commissions. No further payments have been made and the purchaser has never terminated the contract but is willing to complete it. There is a cloud upon the title on part of the property which the defendant has been unable to remove, claiming that delay was caused by the purchaser's failure to obtain and examine the search, and extensions of time within which to complete the contract have been given. Of these the plaintiff had no knowledge and never consented to them. The plaintiff brings this action for his commissions on the ground that the failure of the purchaser to carry out the contract of sale is due to the fault of the defendant. The defendant claims that the commissions are not yet due. *Held*, that the question whether delay was caused by the defendant or by the purchaser is a question of fact for the jury. *Held, further*, that if it should be determined that the delay was caused by defendant, the broker is entitled to commissions upon all installments of the purchase price due before the beginning of the action. *Colvin v. Post M. & L. Co.* 510

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CONTRACT.

1. *Damages* — Action for breach of contract to furnish first run of "feature" motion picture films. The defendant undertook to supply the plaintiff with motion picture films for a stated period. The pictures were to be exhibited at the plaintiff's theatre and were to be of the order known as the first run of "feature" pictures. The contract having been broken by the defendant, the plaintiff unsuccessfully attempted to procure first-run pictures elsewhere. It has sued to recover profits alleged to have been lost, and a verdict in its favor has been unanimously affirmed. *Held*, that the plaintiff was improperly permitted to prove its receipts from other pictures, supplied by other producers, before the breach and after. *Broadway Photo-play Co. v. World Film Corpn.* 104

2. *Erroneous denial of motion to strike out evidence.* The jury was charged that the plaintiff was "limited to the difference in value between first-run feature pictures and second or third-run feature pictures, and not to the difference between feature pictures and other pictures." *Held*, that while the comparison must be between feature pictures and feature pictures of the first run and feature pictures of later runs, there is nothing in the evidence to supply a basis for such comparison, and that the motion to strike out the evidence offered for that purpose was erroneously denied. *Id.*

3. *Erroneous admission of expert evidence.* Experts were permitted to show their experience in other theatres in other sections of the city which were run under different conditions of competition. *Held*, that the comparison was misleading, and the admission of the evidence erroneous. *Id.*

4. *Builder's contract* — Substantial performance — Quantum meruit — Trial — Requests to charge. The parties entered into negotiations for a contract for the construction of a steel grain tank. A written contract was prepared but was not entered into owing to the inability of the parties to agree on terms of payment. Work was commenced, however, on the job and plaintiff claims that it was fully completed. Final payment was refused because of defendant's claim that the work was not done according to contract specifications. Plaintiff contends that this is an action on quantum meruit, that it is entitled

CONTRACT — Continued.

to recover the actual value of its work and materials, but it appears that its bargain was to construct the plant according to the plans and specifications which were to form part of the written contract. Plaintiff relied on the price specified in the unexecuted contract as being substantially the fair value of what the plans and specifications called for. The failure to agree on a price and terms of payment did not excuse plaintiff from proving performance. Hence, plaintiff was entitled to recover the fair value of its work and materials only as it built them into the elevator plant which it agreed to construct. The capacity of the elevator which was to be built was to be 4,000 bushels an hour. The evidence tended to show that its capacity was not more than 3,300 bushels an hour. The credibility of this evidence was for the jury, but it squarely presented the question of non-performance of an essential feature of the contract. The judge charged the jury generally that "a substantial performance of the work is required." The plaintiff's counsel requested the jury be specifically instructed that if they found the capacity of the elevator was not more than 3,300 bushels per hour the plaintiff could not recover because he had not substantially performed his contract, which request was refused. This instruction should have been given and failure to do so was substantial error. *Steel Storage & Elevator Const. Co. v. Stock.* 173

5. *Village officers — When attorney employed by village at annual salary an employee of the village and not a public officer thereof — When entitled to compensation although all officers of village discharged when it became incorporated as a city.* Where an act incorporating a village contained a list of village officers in which the village attorney was not named, but the act provided that it should be the duty of the board of trustees and it should have the power and authority "to appoint annually an attorney and pay such attorney a reasonable annual salary," and the board appointed plaintiff such attorney and at the same time fixed his salary at a certain sum for a year, plaintiff was an employee of the village and not a public officer. He is, therefore, entitled to compensation for the year, no fault being found with his services, notwithstanding that a few months after his appointment as village attorney the village was incorporated as a city, the act of incorporation providing that all debts of the former village should be debts of the city, the plaintiff having been discharged on the theory that he held a public office in the village, which terminated on the organization of the city. *Fisher v. City of Mechanicville.* 210

6. *Execution of written contract purporting to be same as oral contract previously agreed upon by parties but guaranty of which was omitted in written contract — Party induced to sign such contract by false statements of contents thereof by other party — Action for breach of warranty of oral contract — When such action can be maintained and damages recovered.* There is a material and manifest distinction between a meeting of the minds of parties through deceit on the part of one of them, and a writing excusably and justifiably executed by the one which, through the deceit of the other, does not express the agreement of the parties. A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery. There has been no intelligent assent to its terms, and it is a fraud in one who with knowledge of the facts attempts to enforce it. The complaint alleges a contract by plaintiff's testator, its breach and resultant damages. The testimony of plaintiff's testator proved an oral contract, whereupon the defendant proved by him his signature

CONTRACT — Continued.

to a writing in form a contract set forth in the answer. Plaintiff's testator testified that after the oral contract had been completely made he handed defendant's representative his list of varieties of trees he wanted, and defendant's representative wrote down the varieties, calling them as he wrote them, and handed the order to the witness to sign, who, because he had not his glasses, could read nothing of the writing and so stated to the representative, who said that it contained nothing but a statement of the varieties and the sizes and prices and time of delivery. In fact it differed materially from the oral contract. Plaintiff's testator thereupon signed it. This testimony was taken under the objection of the defendant that it was incompetent, that the writing was the best evidence of the contract and that no fraud was alleged in the complaint, and under an exception to the adverse ruling. The court, in effect, submitted to the jury the questions: (a) Was the testator bound by the written order, notwithstanding that he did not read it, or did the conditions justify him in signing it without reading it; (b) did the writing or the oral agreements constitute the contract; and charged that if the writing constituted the contract the plaintiff could not recover; if the oral agreements constituted the contract the plaintiff could recover the damages resulting to the testator from its breach. The verdict was for plaintiff. *Held*, that the evidence of the oral contract was properly received, and that upon the facts found by the jury the writing was void at law. The contract was not susceptible of rescission and there was no reason for its reformation. *Whipple v. Brown Brothers & Co.* 237

7. *Constructive trust — Court of equity bound by no unyielding formula — Equity of transaction must shape relief.* An agent or a partner who breaks a covenant not to engage in some other business does not, as a matter of course, become chargeable as a trustee for the profits of the forbidden venture. A constructive trust is the formula through which the conscience of equity finds expression, and when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of the relief. *Beatty v. Guggenheim Exploration Co.* 380

8. *When employer may hold employee as trustee and require him to account for profits of personal transaction.* Where an employee agrees with his employer that he will not become directly or indirectly interested in, or connected with, any person engaged in any similar business, and thereafter purchases, in conjunction with another, rights in certain mining claims which he believed to be essential to the successful operation of those in which his employer is interested, the latter, not consenting to the investment, has the privilege, if he so elects, to hold the employee as trustee and may require him to renounce the profits of the transaction and transfer the claims at cost. *Id.*

9. *When oral consent of employer to such transaction precludes him from impressing such a trust and acquits employee of breach of written contract forbidding his engaging in business similar to his employer's.* Where, however, it appears that the employee, when he associated himself with a partner in the enterprise, reserved the right of withdrawal, and the employer, with knowledge that the employee had reserved this privilege, consented that the investment be retained, the employer may not have the aid of a court of equity to impress upon the investment the quality of a constructive trust. Nor does the

CONTRACT — *Continued.*

fact that the written contract of employment contains a covenant that there shall be no waiver or amendment thereof not evidenced in writing, alter the situation. Those who make a contract may unmake it, and where, on the faith of the consent, the employee, as here, turned a loan into a purchase, the consent, though oral, gives protection to the employee, and acquits him of a breach of contract. The oral consent is at least equivalent to an election that the agent shall not be charged as a trustee. It is an election between remedies and such an election can be made without a writing. *Id.*

10. *Specific performance — Husband and wife — Execution of will by each giving all property to the other under an agreement that survivor should by will distribute the property among the next of kin of both — When the wife, who survived her husband, failed to comply with the agreement, the next of kin of her husband can maintain an action for the specific performance of the contract.* An agreement is valid and enforceable under which a childless husband and wife execute wills giving all their property to each other, the survivor to execute a will disposing of the entire property constituting both estates by distributing the same among the next of kin of the husband and wife, the distribution to be made in sums according to the judgment of the survivor. Where such an agreement was made and the wife, who survived her husband, made a will giving a certain amount to her husband's next of kin and a certain amount to her own next of kin, substantially the total of the combined estates, and reciting the agreement, but thereafter made a second will, giving the entire estate to her own next of kin, revoking her first will, the next of kin of her husband may maintain an action for the specific performance of the contract between the husband and wife, and the Statute of Frauds is not a bar to such action. Where upon the trial of such an action the trial court found as a fact that no such agreement was made by the husband and wife and that the execution of the revoked will was obtained by fraud and duress and that it was null and void and, therefore, dismissed the complaint; and, upon an appeal from the judgment of the trial court, the Appellate Division found as a fact that such agreement was made, but affirmed the judgment upon the sole ground that the agreement did not require the wife, as the survivor, to give to the next of kin of her husband any substantial amount and that equity would not interfere to enforce a mere nominal right in their favor, *held*, that the next of kin of the husband, although they cannot object to the probate of the last will of the wife, may enforce the contract in equity. The order and judgment of the Appellate Division should be reversed and a new trial ordered, in which the contract may be enforced. As the wife had the right to revoke her will the property should be distributed in accordance with the provisions of the Decedent Estate Law (Cons. Laws, ch. 13, §§ 29, 98) and of the Real Property Law (Cons. Laws, ch. 50, § 160). At most one-half of the estate may go to the next of kin of the husband. *Morgan v. Sanborn.* 454

11. *Stock subscriptions — Construction of agreement proposed to be entered into by a syndicate composed of subscribers of bonds to be issued to build a proposed railroad and the railroad promoters as managers of the proposed syndicate — When such agreement signed by only one subscriber for bonds does not authorize promoters to borrow money on strength of such subscription — When subscriber who is not liable for such loan may have agreement and subscription canceled.* In the absence of estoppel the party who has given an authority in writing is right in asking that that authority be followed as it is stated, and not as the other parties thought he would be willing they should use it. Nothing

CONTRACT — *Continued.*

can be added to or read into the agreement unless there be an ambiguity which gives play for judicial interpretation. Agreements to subscribe for the stock of a corporation to be formed presuppose the organization of the corporation before they become binding and enforceable. In the absence of express authority to borrow upon an individual subscription to buy bonds, the agreement to subscribe assumes the incorporation of the binding company and that it will not be enforceable until that time. In order to carry out a scheme to construct a proposed railway and acquire the stock and bonds of two railroads, one built and one projected, to be amalgamated into one system with the proposed railway, an agreement was proposed to be entered into by a syndicate composed of the subscribers for the bonds to be issued in order to finance the scheme and a firm of promoters as managers of the syndicate. The syndicate was to apply the proceeds of such bonds to the construction of the proposed railway and do all things its managers deemed fit to accomplish that purpose, including the right to arrange for advances to be made from time to time upon the security of the agreement for building the railroad. The plaintiff herein alone signed such agreement as a subscriber to a designated number of bonds, a small part of the number proposed to be issued. Upon these facts, it cannot be held that loans were to be procured upon the strength of such agreement before the contemplated railway was incorporated or bonds issued or authorized to be issued. Where the managers of the proposed syndicate, without the knowledge of plaintiff, procured a loan upon their note as managers secured by the subscription agreement signed by plaintiff, part of which loan was used to repay another loan made by said trust company to said promoters over a month before the plaintiff signed the agreement, the plaintiff is not obligated under such subscription to reimburse the trust company for the loan to the promoters, who are insolvent, but is entitled to have the agreement canceled. *Jermyn v. Searing.* 525

12. *Construction and effect of letters constituting agreement to do certain work and fixing compensation therefor.* Plaintiff wrote defendant offering to do engineering work required by it "including supervision of construction, furnishing all plans and specifications and negotiations of contracts for six per cent of the completed work ending October 31st, 1914." Later he wrote that by his letter he meant that he would supervise the work and assume the same charges as before, "furnishing the same work, and also paying the expenses of certain employees * * * and after making a charge of six per cent on the total amount of construction, taking from that total of commissions the expenses of these various employees and a certain proportion of the office expenses." For a time, six per cent less expenses was paid plaintiff. Later, the defendant being dissatisfied, plaintiff wrote that it is understood under the agreement by which he was to receive six per cent on costs for engineering services that this charge should "not be more than \$6,000." Held, that plaintiff by the latter statement limited the balance payable to him after the expenses were deducted to \$6,000, and under this construction there was evidence supporting the plaintiff's claim of a balance due him. *Clark v. Carolina & Yadkin River R. R. Co.* 589

See *Federal Terra Cotta Co. v. Potterton Bros.* (Mem.), 623; *Cranford v. Brooklyn Heights R. R. Co.* (Mem.), 640; *American Bonding Co. v. Kelly* (Mem.), 641; *Blumenthal & Co. v. Radow* (Mem.), 641; *Hayman v. Canton Art Metal Co.* (Mem.), 643; *Steiner v. American Alcohol Co.* (Mem.), 665; *Sohland v. Pennsylvania Silk Co.* (Mem.), 672; *Sprague v. Webb* (Mem.), 685; *De Carlton v. Glaser* (Mem.), 687;

CONTRACT — *Continued.*

Long Island R. R. Co. v. American Bridge Co. (Mem.), 692;
Brooklyn E. D. Terminal v. Central R. R. Co. of N. J. (Mem.),
712; Peerless Pattern Co. v. McClure Publications Co. (Mem.),
720.

Bill of lading — provision that goods received from private or other sidings shall be at owner's risk until "cars are attached to and after they are detached from trains" — construction and meaning of term "private or other sidings."

See CARRIERS, 1.

When real estate broker who has negotiated a sale entitled to his commissions — construction of contract providing that broker should receive his commissions on installments as paid by purchaser — extensions of time to complete contract of sale — broker's claim for commissions on unpaid installment — question whether delay was caused by seller or purchaser for jury.

See COMMISSIONS.

Contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years — increase of such rates by company on the ground that they have become insufficient and confiscatory owing to increased cost of production — power of public service commission to regulate such rates.

See GAS AND ELECTRICITY, 4.

Accident — standard provisions of policy not whole contract — rider part of policy and should be filed with superintendent of insurance — effect of failure to file — rider which does not contradict or vary standard provisions valid — classification of risks — provision that change in policy must be approved by officer of company is for benefit of insurer — provision that clause reducing indemnity must be printed in bold-face type when not applicable to rider.

See INSURANCE, 1-6.

False statement in application for policy of accident insurance — annual receipt not a reissue of policy — provision of section 58 of Insurance Law that policy shall contain entire contract not applicable to accident insurance.

See INSURANCE, 10-12.

Contract for furnishing and equipping locker rooms in state capitol — assignment of such contract to bank as security for loan — state architect proper officer with whom to file assignment — trustees of public buildings must consent to such assignment — if such consent be not obtained before assignment is filed, the assignment cannot be enforced as against a subsequent mechanic's lien against contractor.

See LIENS, 8.

Master and servant — contract of employment — compensation of salesman consisting in part of share of net profits — inventory — charges of depreciation of stock against profits for year — effect of evidence that such charges were not made in good faith — order of reference cannot be reviewed upon appeal from final judgment.

See MASTER AND SERVANT, 1-3.

Title guaranty — when vendee who at time of execution of contract of sale knew of defect cannot recover against drawer of contract and of subsequent deed for failure to protect him — policy of insurance

CONTRACT — *Continued.*

may define "loss" intended to be covered — when owner of real property may insure himself against defects in title of which he had knowledge — when dismissal of counterclaim pleading facts which would entitle insurer to reformation of policy is error.

See NEGLIGENCE, 5-8.

When action of replevin will lie to recover from owner possession of chartered scow.

See REPLEVIN.

Action for rescission of subscription to stock and for rescission of contract of employment — when action for rescission of subscription to stock may be maintained on ground of fraud — action for rescission of contract cannot be maintained when plaintiff has other and adequate remedy.

See STOCKS AND STOCKHOLDERS, 3-5.

CONVERSION.

See *Jenkins v. Teed* (Mem.), 661; *Johnson v. Syracuse Dry Goods Co.* (Mem.), 705; *Lee v. Erie R. R. Co.* (Mem.), 727; *Fleming v. Barrett* (Mem.), 730.

Pledgor and pledgee — stock pledged to secure payment therefor — when dividends declared on stock are cash and should be applied on the indebtedness — sale of pledged stock with accumulated dividends thereon unlawful — rights and remedies of pledgor.

See PLEDGE, 1.

When agent of surety company who received money for company not liable for moneys which the company refused to repay after the agency had terminated.

See PRINCIPAL AND AGENT, 1.

CORPORATIONS.

Gas companies — inadequate and confiscatory rates fixed by statute — power of courts to regulate rates — aggrieved party may maintain action in equity to restrain enforcement of confiscatory rates — sufficiency of pleading.

See GAS AND ELECTRICITY, 1-3.

When corporation may maintain action for libel without proof of special damage — if words complained of are ambiguous, their meaning and application are questions for jury — when entire publication may be shown.

See LIBEL, 1-4.

Foreclosure of mechanic's lien filed against corporation.

See LIENS, 2-7.

Liability of holder of capital stock, not fully paid, for debts of corporation — liability of such stockholder for royalties for use of patent, which accrued after his purchase of stock.

See STOCKS AND STOCKHOLDERS, 1, 2.

COURT OF APPEALS.

Construction of Constitution must be directly involved to warrant appeal for that reason, without permission to Court of Appeals.

See APPEAL, 1.

COURT OF APPEALS — *Continued.*

Where affirmance by Appellate Division was based upon discretionary power, appeal to Court of Appeals will be dismissed.

See APPEAL, 2.

Order of Appellate Division reversing a judgment of conviction and ordering a new trial "for errors of law only"—such order cannot be reviewed in Court of Appeals—order should show that decision was upon weight of evidence.

See APPEAL, 3.

Order dismissing writ of habeas corpus not appealable to Court of Appeals as involving a constitutional question.

See APPEAL, 4.

Reversal by Court of Appeals of order of Appellate Division reversing on law leaves facts as found by jury unaffected.

See APPEAL, 5.

Appeal may be taken of right from order of Appellate Division directing final judgment.

See APPEAL, 6.

When power of Court of Appeals to review on the evidence is not defeated by unanimous decision of Appellate Division.

See APPEAL, 7.

Appeal may not be taken direct to Court of Appeals from final judgment entered upon reversal of interlocutory orders.

See APPEAL, 8.

Non-unanimous decision of Appellate Division affirming a judgment of conviction—Court of Appeals must examine record to ascertain whether there is evidence tending to support verdict of guilty.

See CRIMES, 5.

Order of Appellate Division modifying order is appealable of right to Court of Appeals.

See ELECTIONS, 5.

Question of irregularity of plaintiff's lien not having been considered by Appellate Division, such question cannot be reviewed in Court of Appeals.

See LIENS, 9.

COURTS.

Court cannot under section 381 of Election Law direct production of protested, void or blank ballots.

See ELECTIONS, 3.

COVENANTS.

When restrictions in deed as to kind of houses and use thereof to be erected upon land conveyed to grantee run with the land and bind subsequent purchasers thereof—when a breach of such restrictions may be restrained by injunction.

See REAL PROPERTY.

CRIMES.

1. *Labor Law — Not a criminal statute — Punishment for breach.* The Labor Law (Cons. Laws, ch. 31), standing by itself, is not a criminal statute, but a separate statute (Penal Law, § 1275) supplements its mandates and prohibitions by attaching penal consequences. These do not of necessity affect the meaning that the Labor Law would have without them; the scope of the duty is one problem; the extent to which the breach may be visited with punishment another. *People ex rel. Price v. Sheffield Farms, etc., Co.* 25

2. *Provision prohibiting employment of children under age of fourteen years — Employer equally liable whether child is employed by himself or his agents.* Section 162 of the Labor Law prohibiting the employment in or in connection with mercantile establishments of children under the age of fourteen years is directed primarily against the employer, and only secondarily against others as they may aid and abet him. He must neither create nor suffer in his business the prohibited conditions. He may not escape the duty by delegating it to others. He breaks the command of the statute if he employs the child himself and he breaks it equally if the child is employed by agents to whom he has delegated his own power to prevent. And what is true of employment is true of the sufferance of employment. The statute makes no distinction between sufferance and permission. *Id.*

3. *Legislature had power to make violation of statute a criminal offense and provide for punishment by fine.* Any act or omission that will charge an employer with a breach of section 162 of the Labor Law becomes by force of section 1275 of the Penal Law a breach of that statute as well. There was power in the legislature to impose this stringent penalty and to punish offenders by fines moderate in amount, but in sustaining the power to fine this court is not to be understood as sustaining to a like length the power to imprison. The statute is not void as a whole though some of its penalties may be excessive. The good is to be severed from the bad and the valid penalties remain. *Id.*

4. *When fine properly imposed.* Where upon the trial of an information charging a violation of section 162 of the Labor Law there is some evidence of the defendant's negligence in failing for six months to discover and prevent the employment of a child under the age of fourteen years, the omission to discover and prevent was a sufferance of the work and for the resulting violation of the statute a fine was properly imposed. *Id.*

5. *Appeal — Non-unanimous decision of Appellate Division affirming a judgment of conviction — Court of Appeals must examine record to ascertain whether there is evidence tending to support verdict of guilty.* Where a decision of the Appellate Division affirming a judgment convicting a defendant of murder in the second degree is not unanimous the Court of Appeals must examine the record to ascertain, as a question of law, whether there is evidence tending to support the verdict of guilty, and also to ascertain whether any alleged error, raised by an exception at the trial, has validity. *People v. De Simone.* 261

6. *Immaterial that improper ground for receiving competent evidence was stated.* Where evidence is competent and admissible it is immaterial that an improper ground for receiving it was stated, and a judgment convicting a defendant of murder in the second degree will not be reversed for such alleged error. *Id.*

7. *When statement of witness that "somebody in the crowd hollered" admissible as explanatory of the acts of the witness.* Upon the trial of defendant herein a police officer who helped in the arrest of the

CRIMES — Continued.

defendant testified that, hearing a shot, he was running to the place from which the sound came and as he reached a street corner "somebody in the crowd hollered, 'He ran over Houston Street,'" and looking he saw the defendant running and followed him, overtaking him as another officer stopped him. He found upon the ground near the defendant the pistol which was introduced in evidence. Defendant's counsel objected to the statement of the witness that "somebody in the crowd hollered," as incompetent, irrelevant and immaterial, hearsay in the absence of this defendant and not binding on the defendant." The court overruled the objection on the ground that the testimony was part of the *res gestæ*. *Held*, that the testimony, although hearsay, was competent, not as of the *res gestæ*, but as part of the relevant explanation and description of the acts of the witness, in acquiring the testimony given by him. *Id.*

8. *Seduction — Indictment for seduction under promise of marriage — Corroboration required to support testimony of complainant.* It is required by way of corroboration of the testimony of a complainant on the trial of an indictment for seduction under promise of marriage (Penal Law, § 2177) that there should be some fact deposed to, independently altogether of the evidence of the complainant, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. Such corroboration must be of a character which tends to prove the defendant's guilt by connecting him with the crime, and if there be no such evidence tending to connect the defendant, a question of law is presented reviewable by this court. The corroborating evidence must be such as tends to connect the defendant with the sexual act. *People v. Taleisnik.* 489

9. *Erroneous refusal to charge that jury could not consider testimony as corroborative evidence.* The defendant was convicted of the crime of seduction under promise of marriage (Penal Law, § 2175), and judgment of conviction has been unanimously affirmed by the Appellate Division. The woman testified that under a promise of marriage defendant seduced her and detailed the circumstances. She also stated that the accused accompanied her to a doctor's office where he admitted that she was his wife. The doctor was called and stated that the woman called with a man who represented himself to be her husband but whom he failed to identify as the defendant. The court refused a request to charge the jury that they could not consider the testimony of the doctor or any part of it as being corroborative evidence. *Held*, error. A witness testified that in response to a question as to the time of his marriage to complainant, defendant stated that "physically, spiritually, bodily and morally they were married, ritually they would be married very soon." The court erroneously refused to charge the jury that if these words were employed, still "if they find that they were used at a time and under such circumstances as to indicate that they were not intended by the defendant as an assertion that he had had sexual intercourse with the prosecutrix, that they cannot then consider such testimony as being corroborating evidence of the act of sexual intercourse." *Id.*

10. *Motor vehicles — Violation of statute requiring person who injures the person or property of another in operating an automobile to give his name and other facts to the injured person or a designated officer — Evidence — Res gestæ — When declaration of injured person admissible in evidence upon trial of defendant indicted for violation of said statute.* The legislature has directed that an appellate court, in a criminal case, shall give judgment without regard to technical errors or defects

CRIMES — *Continued.*

or exceptions which do not affect the substantial rights of the parties (Code Crim. Pro. § 542), and where the jury, upon the trial of a defendant indicted for a crime, if governed by the rule of reason as laid down by the trial judge and guided by the light of human experience in determining the facts, could not have rendered a verdict other than a verdict for conviction, because the defendant's own testimony, taken in connection with the conceded and uncontradicted facts, required such result, the admission in evidence of a declaration of a person injured by the unlawful act of defendant does not affect the substantial rights of the defendant. Where upon the trial of a defendant who, in violation of the Highway Law (L. 1909, ch. 30, § 290, subd. 3, as amd. by L. 1910, ch. 374) and knowing that the automobile which he was operating had collided with a wagon throwing the driver thereof to the street and injuring him seriously, had nevertheless gone on without stopping and giving his name and other facts required by the statute to the injured person or to any police, or other, officer, the judgment of conviction should not be reversed because a witness, who had heard the sound of the collision and was looking out of the window when defendant drove away, and saw the injured man crawling to the sidewalk and heard him call for help and a doctor, was permitted to state what he said. The evidence was admissible because it was a part of the *res gestæ*; the declaration was spontaneous and natural and the circumstances exclude the idea of fabrication. *People v. Curtis*. 519

Compensation of attorney on appeal from judgment of death.

See ATTORNEYS.

DAMAGES.

When excess charge by carrier above reasonable rate not true measure of damages sustained by exaction.

See CARRIERS, 4.

Measure of damages in action for breach of contract to furnish motion picture films.

See CONTRACT, 1-3.

Compensatory damages only may be recovered in action by parent for loss of services of child.

See PARENT AND CHILD, 4.

Measure of damages in action for conversion of stocks.

See PLEDGE, 2.

DEATH.

Presumption of death arising from absence.

See INSURANCE, 7-9.

DEBTOR AND CREDITOR.

See *Irving National Bank v. Gray* (Mem.), 627; *Fisher v. Johnson* (Mem.), 691.

DECEDENT'S ESTATE.

See *Vose v. Conkling* (Mem.), 642.

Agreement by husband and wife to execute wills giving all their property to each other — specific performance.

See CONTRACT, 10.

DECEDENT'S ESTATE — *Continued.*

Rule as to weight and quality of evidence offered in support of claims against decedent's estate — when section 829 of Code of Civil Procedure not applicable.

See EVIDENCE, 2.

Transfer tax is a lien upon appraised value of each interest bequeathed, not upon gross amount of several bequests to any one individual — devise of real estate not subject to lien for transfer tax upon bequest of personal property to devisee.

See TAX, 1, 2.

Real property — remainders — reversion — express trust conveying real property to trustee to pay income thereof to grantor with directions to convey to grantor's heirs upon his death — when such trust does not transform the reversion to grantor's heirs into a remainder.

See TRUST, 1.

Gift of remainder of residuary estate to a library — consolidation of such library with a municipal public library and surrender of its charter before termination of the trust estate — legacy to library did not vest on death of testator and library having ceased to exist before life estate terminated, the legacy lapsed and became property as to which testator died intestate and passed to his heirs and next of kin.

See TRUST, 2, 3.

DECEDENT ESTATE LAW.

Distribution of personal property of decedent.

See CONTRACT, 10.

DEEDS.

Restrictive covenants — when restrictions in deed as to kind of houses and use thereof to be erected upon land conveyed to grantee run with the land and bind subsequent purchasers thereof — when a breach of such restrictions may be restrained by injunction.

See REAL PROPERTY.

DIVIDENDS.

Stock pledged to secure payment therefor — when dividends declared on stock are cash and should be applied on the indebtedness — sale of pledged stock with accumulated dividends thereon unlawful — rights and remedies of pledgor.

See PLEDGE, 1, 2.

DOMESTIC RELATIONS LAW.

Judgment confessed in favor of defendant to induce her to procure a divorce from plaintiff — such judgment is against public policy and illegal and cannot be enforced.

See JUDGMENT.

DOWER.

See Springsteen v. Springsteen (Mem.), 630.

EDUCATION LAW.

Dissolution and consolidation of school districts — powers of district superintendent in such matters under the statute — provision of statute permitting appeals to state commissioner of education constitutional

EDUCATION LAW — *Continued.*

and valid and his decision on appeal from an order of consolidation not open to review in the courts.

See SCHOOLS, 1-4.

EJECTMENT.

See de Caumont v. R. C. Church of St. Louis (Mem.), 644;
Thomas v. Colbath (Mem.), 716.

ELECTION.

Election of remedies — Principal and agent — Sale of goods to an agent of an undisclosed principal — Attempt to recover value of goods from agent after seller has knowledge of all the facts of the agency. The question of election implies full knowledge of the facts necessary to enable a party to make an intelligent and deliberate choice. When a person sells goods to another who is in fact an agent of an undisclosed principal, he may upon discovery of the principal resort to him or to the agent, at his election, but if, after having come to a knowledge of all the facts, he elects to hold the agent, he cannot afterwards resort to the principal. When such creditor after all the facts have become known to him obtains a judgment against the agent, it is an election to resort to the agent to whom the credit was originally given and is a bar to an action against the principal. *Georgi v. Texas Company.* 410

ELECTION LAW.

Purpose and scope of section 381 of Election Law — ordinary writ of mandamus authorized thereby — when affidavit insufficient to warrant issuance of writ — court cannot, under section 381 of Election Law, direct production of protested, void or blank ballots — Appellate Division cannot, under section 381, order judicial review of ballots cast — order of Appellate Division modifying order is appealable of right to Court of Appeals.

See ELECTIONS, 1-5.

Order that examination of ballots, upon application under section 374 of Election Law, shall take place after completion of canvass, proper.

See ELECTIONS, 6.

ELECTIONS.

1. *Purpose and scope of section 381 of Election Law — Ordinary writ of mandamus authorized thereby.* Section 381 of the Election Law (Cons. Laws, ch. 17) empowers the court, under the requisite allegations in behalf of a candidate voted for at an election and sufficient proof, to require, through a writ of mandamus, the board of canvassers of the return of the inspectors of election, to recanvass and correct the errors in the original canvass of the protested, or void, or blank ballots. The writ of mandamus so authorized is the ordinary writ and the ordinary and established rules and procedure are applicable to it. *Matter of Whitman.* 1

2. *When affidavit insufficient to warrant issuance of writ.* The applicant must, by written and verified allegations, present to the court facts which, if true and unavoids by the defensive facts, prove that he is under a grievance or injury which the writ would remedy and that he is entitled to that remedy, and the averments presenting those facts and essential to the issuance of the peremptory writ cannot be upon mere information and belief of the affiant. Hence an affidavit, in a proceeding under this section, which does not aver that the inspectors of election made an error or omitted any duty, is insufficient to empower the court to issue a writ of mandamus. *Id.*

ELECTIONS — *Continued.*

3. *Court cannot, under section 381 of Election Law, direct production of protested, void or blank ballots.* Section 381 of the Election Law authorizes exclusively the application for the writ, and the order for and its issuance in accordance with the established rules relating to that remedy. It does not contain any provision empowering the court to order the custodian of the protested, void or blank ballots to produce those ballots to the court for any purpose. And the court cannot by the effect of any of its provisions direct the production of them. *Id.*

4. *Appellate Division cannot, under section 381, order judicial review of ballots cast.* No provision of section 381 empowers the Appellate Division to institute or order, as a proceeding, "a judicial review of the ballots cast," or to order the Special Term to enter upon and conduct such a review or, in the first instance, to order the Special Term to inspect or investigate the ballots or to order the custodian of the ballots to produce them before the Special Term, nor can the provisions of section 374 be made the basis of such an order where the proceeding was expressly and concededly commenced, and from the beginning has been opposed, under section 381. *Id.*

5. *Order of Appellate Division modifying order is appealable of right to Court of Appeals.* The order of the Appellate Division is one of modification (Code Civ. Pro. § 190, subd. 1) and also institutes a proceeding distinct, independent and involving no further or future order; hence, an appeal may, of right, be taken to this court. *Id.*

6. *Order that examination of ballots, upon application under section 374 of Election Law, shall take place after completion of canvass, proper.* Upon an application, under section 374 of the Election Law (Cons. Laws, ch. 17), for an order permitting examination of ballots cast at a general election and fixing the time therefor, the court may properly consider facts relating to the canvass of the vote and determine that it is proper, under the circumstances, that the examination should not take place until after the canvass of all votes is completed. *Matter of Whitman.* 21

EQUITY.

Public service corporation may maintain action in equity to restrain enforcement of confiscatory rates.

See GAS AND ELECTRICITY, 1-3.

ESTATES.

Agreement by husband and wife to execute wills giving all their property to each other — specific performance.

See CONTRACT, 10.

Transfer tax is a lien upon appraised value of each interest bequeathed, not upon gross amount of several bequests to any one individual — devise of real estate not subject to lien for transfer tax upon bequest of personal property to devisee.

See TAX, 1, 2.

Real property — remainders — reversion — express trust conveying real property to trustee to pay income thereof to grantor with directions to convey to grantor's heirs upon his death — when such trust does not transform the reversion to grantor's heirs into a remainder.

See TRUSTS, 1.

Gift of remainder of residuary estate to a library — consolidation of such library with a municipal public library and surrender of its

ESTATES — Continued.

charter before termination of the trust estate — legacy to library did did vest on death of testator and library having ceased to exist before life estate terminated, the legacy lapsed and became property as to which testator died intestate and passed to his heirs and next of kin.

See TRUST, 2, 3.

EVIDENCE .

1. *When error to exclude evidence tending to show breach of warranty.* Where in an action to recover for goods sold the answer sets up a counterclaim alleging breach of warranty and the reply does not deny that there was such a warranty it is error to exclude evidence which tended to show that the articles furnished were not fit and proper for the purposes intended. *Pulnam v. Interior Metal Manfg. Co.* 37

2. *Rule as to weight and quality of evidence offered in support of claim against decedent's estate.* In applying the rule and test that the plaintiff must establish his claim by a fair preponderance of evidence, it very likely will and should occur that the triers of fact will more carefully and critically scrutinize evidence offered against a dead person's estate for the purpose of deciding whether it does furnish the necessary weight and preponderance, than would be done if the testimony was offered against one who was alive to contradict it, but the general rule as to weight and quality of evidence is no different in one case than in the other. *Ward v. N. Y. Life Ins. Co.* 314

3. *Section 829 of Code of Civil Procedure not applicable to case where party claims property from third person which never belonged to deceased.* When section 829 of the Code of Civil Procedure speaks of deriving title or interest from, through or under a deceased person it contemplates property or an interest which belonged to the deceased in his lifetime and the title to which has passed by assignment or otherwise through him to the party who is protected by the section. These authorities do not contemplate a case where a party claims property from a third person which never belonged to the deceased and which in fact did not come into existence until his death. *Id.*

4. *When claimant to insurance money cannot be said to be claiming "from, through or under" the insured.* A person claiming money directly from an insurance company by virtue of a designation under a policy cannot be said to be claiming "from, through or under" the insured in said policy even though the latter has made the designation. *Id.*

5. *Inadequacy of evidence to sustain claim of oral assignment of insurance policy.* Plaintiff claims an oral assignment of an insurance policy which was issued to her deceased husband upon his life payable to his personal representative or assigns. His sons were designated by him and recognized by the insurance company as beneficiaries under the policy. The wife claims the proceeds of the policy under an equitable parol assignment for value antedating the designation of the sons as beneficiaries. The testimony relied upon by plaintiff is to the effect that the insured said he had assigned to her his life insurance or his life insurance policies, and she says that on the strength of these statements she from time to time loaned him various sums of money, reaching in the aggregate a considerable amount. The insured never executed any written assignment and never delivered to her or surrendered control over the policy. *Held*, that she failed as matter of law to produce evidence which would have permitted the court to find that an assignment had been made. *Id.*

EVIDENCE — Continued.

6. *Distinction between insufficient evidence and unsatisfactory evidence.* There is a distinction between insufficient evidence and unsatisfactory evidence. The statement that "insufficient evidence is, in the eye of the law, no evidence," merely means insufficient in law, not insufficient to the mind of one trier of fact with whom others may with reason differ. If any legitimate conclusion can reasonably be drawn from the evidence it should not be wholly rejected by the court. The jury should pass upon it and if the trial judge or the Appellate Division is not satisfied with the soundness of the conclusions reached, the verdict should be set aside and a new trial ordered. *Queeney v. Willi.* 374

7. *When evidence of negligence of landlord sufficient to make a case for the jury.* Actions by tenants against their landlord for negligently failing to protect water pipes under his control from frost whereby the pipes burst and water fell through the ceiling bringing the plaster down with it injuring plaintiff and causing conditions for which damages are sought. Upon the evidence the landlord had sufficient notice of the defective condition of the water pipes to make a case for the jury to pass upon and plaintiff's complaints should not have been dismissed. *Id.*

8. *Elements of damage not alleged in complaint may not be considered.* The bodily injuries sustained by plaintiff in one of the actions as the immediate result of being struck by the falling plaster should not be considered as elements of damage under the complaint which declares on the injuries resulting from the dampness only. "Substantial justice between the parties" (Code Civ. Pro. § 519) means justice to both parties. *Id.*

9. *When judgment is reversed on questions of fact as well as on the law a new trial must be had.* The orders of reversal specify that the finding of the jury that the defendant was guilty of negligence is disapproved by the Appellate Division. It thus appears that the judgments were reversed on questions of fact as well as on the law. A new trial must, therefore, be granted. (Code Civ. Pro. § 1338.) *Id.*

When province of jury to draw conclusion from testimony of experts — whether clerks in bank exercised care and were reasonably prudent questions for jury.

See BANKS AND BANKING, 1, 3.

Erroneous denial of motion to strike out evidence — erroneous admission of expert evidence.

See CONTRACT, 1-3.

Erroneous reason for receiving competent and admissible evidence not sufficient ground for reversal of judgment — when statements made by witness admissible as explanatory of the conduct and acts of the witness.

See CRIMES, 6, 7.

Seduction — indictment for seduction under promise of marriage — corroboration required to support testimony of complainant — judgment of conviction reversed on ground that corroborating evidence is insufficient.

See CRIMES, 8, 9.

When declaration of injured person admissible as part of the *res gesta.*

See CRIMES, 10.

EVIDENCE — *Continued.*

Presumption of death arising from continuous absence of seven years — general rule and application thereof — evidence required to establish such presumption.

See INSURANCE, 7-9.

When entire publication may be shown in action for libel.

See LIBEL, 4.

FALSE ARREST.

Motor vehicles — incorporated villages may by ordinance limit the speed of automobiles and provide that violation of ordinance is a misdemeanor punishable by a fine and imprisonment if fine is not paid — action for false arrest of person violating such an ordinance cannot be maintained.

See VILLAGES.

FALSE REPRESENTATIONS.

Execution of written contract purporting to be same as oral contract previously agreed upon by parties but guaranty of which was omitted in written contract — party induced to sign such contract by false statements of contents thereof by other party — action for breach of warranty of oral contract — when such action can be maintained and damages recovered.

See CONTRACT, 6.

FIREMEN.

New York (city of) — when officers and men of fire department not exempt from limitations in respect of speed — action against fire commissioner for injuries from automobile in which he was being driven by fireman — commissioner not exonerated as of course.

See NEGLIGENCE, 1, 2.

FOOD.

1. *Implied warranty as to wholesomeness* — *Action may be maintained for breach* — *When such implied warranty exists.* Under section 96 of the Personal Property Law (Cons. Laws, ch. 41) there is no implied warranty of fitness in a sale of food unless the buyer expressly or by implication acquaints the seller with the purpose of the purchase and it appears that the buyer relies on the seller's skill or judgment. This section applies to all sales, including sales of food, and any rules hitherto applied inconsistent with it are abolished. If, however, the buyer has examined the goods there is no warranty as to defects which he should have discovered. The burden of showing that he has made known his purpose and that he has relied upon the seller is on him who claims the existence of the implied warranty. The mere purchase by a customer from a retail dealer in foods, however, of an article ordinarily used for human consumption, by implication, makes known to the vendor the purpose for which the article is required and, where the buyer may assume that the seller has the opportunity to examine the article sold, such a purchase, unexplained, is conclusive evidence of reliance on the seller's skill and judgment. *Rinaldi v. Mohican Co.* 70

2. *When inaccurate charge harmless.* In an action, therefore, to recover damages for sickness caused by eating unwholesome meat purchased by plaintiff from defendant, where all that appears is the ordinary transaction between dealer and customer, a charge to the jury that on every sale of food by a dealer for immediate human consumption there is an implied warranty of its wholesomeness,

FOOD — Continued.

while inaccurate, is harmless, since if it does not appear that the buyer has examined the goods or, having examined them, has failed to discover defects which he should have found, such an implied warranty exists. *Id.*

See Maxwell v. Marsh (Mem.), 637.

FORECLOSURE.

See Hamilton Trust Co. v. Flynn (Mem.), 620; Gilmore v. Shuttleworth (Mem.), 626; Greene v. Greene (Mem.), 660; Wood-Harmon Warranty Corp. v. Plandome Constr. Co. (Mem.), 689; Huggins Lumber Co. v. Phelps (Mem.), 703.

FOREIGN LAWS.

Foreign laws are facts which must be proved but their construction and effect are questions for the court — when law of foreign state may be question for the jury.

See PLEADING, 5, 6.

FRAUD.

False promise made with intent to break same — action by members of law firm to recover money embezzled by their junior partner and lost in stock speculations, on margins, in a branch office of defendants conducted and managed by their agent — when defendants not bound by false statements and by acts of their agent in concealing speculations of the junior partner — when evidence insufficient to show authority of defendants' agent in acts complained of or that acts were ratified by defendants — proximate cause — deceit followed by negligence not the immediate cause of loss.

See PRINCIPAL AND AGENT, 3-5.

GAS AND ELECTRICITY.

1. *Gas companies — Inadequate and confiscatory rates fixed by statute — Power of courts to regulate rates — Aggrieved party may maintain action in equity to restrain enforcement of confiscatory rates — Sufficiency of pleading.* The legislature enacted a statute which fixed the maximum charge for illuminating gas in the city of Albany at one dollar per thousand cubic feet (L. 1907, ch. 227). The plaintiff in its complaint herein asserts that changed conditions have made those charges inadequate, and that to compel adherence to the statute is to confiscate its property. It further alleges that during the year 1917 and the first six months of 1918 there was a large deficit owing to the decrease in net earnings; that the deficit is increasing and likely to increase further; that the cost of material and of labor has risen with the war, and that there is no prospect of any decrease therein; and that if these conditions continue, the deficit for 1918 and also for 1919 will be such as that the rate will be confiscatory. Judgment is demanded that the defendants be restrained from compelling the plaintiff to adhere to the statutory maximum. To that complaint the public service commission demurred, and the Appellate Division affirmed an order sustaining the demurrer and allowed an appeal to this court. *Held*, that the rates of public service corporations ought not to be so reduced by statute as to preclude a fair return, and that reduction below this is confiscation. Into every statute of this kind is to be read the implied condition that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. Any party aggrieved may invoke the judgment of the courts to restrain the enforcement of statutes which have become confiscatory. *Held*, further, that

GAS AND ELECTRICITY — *Continued.*

considered as a pleading and accepting it with all its reasonable inferences, unexplained and undenied, the allegations of the complaint make out a *prima facie* case of the denial of a just return. *Municipal Gas Co. v. Public Service Comm.* 89

2. *Statement of cause of action does not involve disclosure of earnings from sales of electricity.* The plaintiff sells electric current as well as gas. At the outset its charter confined it to the manufacture and sale of gas. The manufacture and sale of electric current was added at a later date by separate act, and the complaint alleges that the gas and electric operations of plaintiff have been and now are conducted as distinct and separate departments. *Held*, that under these and other acts, neither business is an incident of the other, nor has any relation to the other. Hence, the statement of a cause of action does not involve the disclosure of the earnings from sales of electricity. *Id.*

3. *Action in equity proper to avoid multiplicity of actions.* There is by resort to this action in equity the avoidance of multiplicity of actions, the saving of waste and friction, the opportunity to analyze accounts so complex as to be unintelligible to juries, and protection against penalties and losses. The plaintiff's business is menaced and there is no adequate remedy at law, and equity, therefore, properly intervenes to save it from impairment in a single comprehensive action. *Id.*

4. *Public service commission — South Glens Falls (village of) — Contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years — Increase of such rates by company on the ground that they have become insufficient and confiscatory owing to increased cost of production — Power of public service commission to regulate such rates.* There is a distinction between a contract made by a gas company to furnish a municipality *itself* with light and the terms and conditions upon which a municipality grants a franchise to furnish gas to its *inhabitants*. In the first instance the arrangement may be a contract pure and simple protected by the Constitution both federal and state from subsequent abrogation even by the legislature unless such power be reserved. But the regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations cannot be said to form contracts beyond the inherent police power of the legislature to modify for the public welfare. In September of 1900 the village of South Glens Falls granted to the defendant company the right and power to use the streets within the village for the purpose of maintaining pipes and necessary feeders for lighting, fuel and other purposes for which gas may be used, for the term of fifty years to be furnished at a certain limited compensation. In August of 1917 the gas company increased its rate. Thereupon the village made complaint under section 71 of the Public Service Commissions Law (Cons. Laws, ch. 48) asking the commission for the second district to investigate the case and prohibit and restrain the gas company from raising its rate above that originally fixed by its license. It appeared that the cost of furnishing gas had during the past few years very largely increased. The only question presented was whether the franchise is such a binding contract that it could not be abrogated in any way by the gas company or by the public service commission. The latter body determined that it had power to regulate the rate to be charged for gas irrespective of the franchise and dismissed the complaint. The Appellate Division reversed the order of the commission and decided in effect that the public service commission had no power over the matter and granted the demand

GAS AND ELECTRICITY — *Continued.*

of the village that the company should be prohibited from charging more than the rate fixed in 1900. *Held, first*, that the legislature under the circumstances mentioned has the power to regulate the price of gas; *second*, that it has conferred that power on the public service commission. (Pub. Serv. Com. L. § 66, subd. 5; § 72.) *People ex rel. Vil. of South Glens Falls v. Public Service Comm.* 216

5. *Transportation of natural gas by pipe lines, from another state to this, is interstate commerce.* The transportation of oil or gas from state to state through the medium of pipe lines to be delivered by the seller in one state to the buyer in another is interstate commerce, and subject to the power of the nation. Interstate commerce does not end until the subject-matter of the sale has been broken up or redistributed or absorbed in the common mass of property within the state, and where there is no break in the continuity of the transmission of natural gas from the pumping station in one state to home and office and factory in a city in another state, such transactions have the unity and directness of interstate commerce. *Matter of Pennsylvania Gas Co. v. Public Service Comm.* 397

6. *Within police power of state to impose reasonable regulations upon business of corporation transporting natural gas by pipe lines into this state.* A corporation transporting natural gas by pipe lines from one state to another is a public service corporation and its rates are subject to regulation by some agency of government, and where gas and water companies are expressly excepted from the act of Congress (Act to Regulate Commerce, as amended June 29, 1906, ch. 3591, and June 18, 1910, ch. 309) regulating interstate commerce, there is no implied exclusion of the police power of the state to impose reasonable regulations upon the business of such public service corporation, although interstate in character. *Id.*

7. *Price at which gas is sold within state subject to regulation by public service commission.* Where a company engaged in the transportation of natural gas by pipe lines from another state to a city in this state occupies the streets of that city with its gas mains it is within the purview of the statute (Public Service Commissions Law, § 65; Cons. Laws, ch. 48) providing that all charges made or demanded by public service corporations for gas or electricity shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Hence a writ of prohibition will not lie against a public service commission to prevent it from considering whether certain rates sought to be put in operation by such a pipe line are exorbitant. *Id.*

GENERAL CONSTRUCTION LAW.

Requirement that Lien Law be construed as continuation of prior law.

See LIENS, 1.

GUARANTY.

See Chimax Road Machine Co. v. Allen (Mem.), 684.

HABEAS CORPUS.

See People ex rel. Collins v. Trombly (Mem.), 675.

Writ to inquire into the detention of one imprisoned, or held in custody, for a crime, is a civil, not a criminal, process, a special proceeding to enforce a civil right — appeal from order dismissing a writ not appealable as involving a constitutional question.

See APPEAL, 4.

HIGHWAY LAW.

Violation of statute requiring person who injures the person or property of another in operating an automobile to give his name and other facts to the injured person or a designated officer — evidence — *res gesta* — when declaration of injured person admissible in evidence upon trial of defendant indicted for violation of said statute.

See CRIMES, 10.

Incorporated village may limit speed of automobile.

See VILLAGES.

HUSBAND AND WIFE.

Execution of will by each giving all property to the other under an agreement that survivor should by will distribute the property among the next of kin of both — when the wife, who survived her husband, failed to comply with the agreement, the next of kin of her husband can maintain an action for the specific performance of the contract.

See CONTRACT, 10.

Public policy — judgment confessed in favor of defendant to induce her to procure a divorce from plaintiff is against public policy and illegal and cannot be enforced.

See JUDGMENT.

INJUNCTION.

See *Kilmer v. Dr. Kilmer & Co.* (Mem.), 705.

When breach of covenant in deed may be restrained by injunction.

See REAL PROPERTY.

INSURANCE.

1. *Accident — Standard provisions of policy not whole contract.* The standard provisions for accident insurance policies contained in section 107 of the Insurance Law (Cons. Laws, ch. 28) are to be contained in every such contract of insurance, but they form simply a part, not the whole thereof. *Hopkins v. Connecticut Genl. Life Ins. Co.* 76

2. *Rider part of policy and should be filed with Superintendent of Insurance — Effect of failure to file.* A rider to a policy of accident insurance is a part thereof and, therefore, within the requirement of the statute (L. 1913, ch. 155, § 107, subd. a) that no policy shall be issued until a copy of its form shall have been filed with the superintendent of the insurance department. Failure to file a rider, however, does not invalidate the policy, but whenever its provisions conflict with subdivision i of section 107 the latter is to govern the rights of the parties. *Id.*

3. *Rider which does not contradict or vary standard provisions valid* A rider to a policy of accident insurance, by which the insured agreed that the policy should not cover any loss caused directly or indirectly by any act of any of the belligerent nations engaged in the present European war, does not conflict with or vary any of the provisions of section 107 of the Insurance Law and is valid and binding upon the insured, subject only to construction as provided by that section, notwithstanding that it had not been filed with the superintendent of insurance.

INSURANCE — Continued.

4. *Classification of risks.* A suggestion that the rider changes the classification of risks cannot be sustained since such classification, in accident insurance policies, relates only to the occupation of the applicant. *Id.*

5. *Provision that change in policy must be approved by officer of company is for benefit of insurer.* The provision in the policy that no change therein shall be valid unless approved by the executive officer of the insurer is for the benefit of the insurer and may be and in this case was waived by it. Furthermore, the policy was not changed where, at its inception, it included the rider. *Id.*

6. *When provision that clause reducing indemnity must be printed in bold-face type not applicable to rider.* An objection that under the statute it is provided that no policy shall be issued unless such portion of the policy as purports by reason of the circumstances under which a loss is incurred to reduce any indemnity promised therein to an amount less than that provided for the same loss occurring under ordinary circumstances, shall be printed in bold-face type and that the rider comes within this clause and is not printed in bold-face type cannot be sustained. It speaks of a case in which the policy does not apply and is simply a limitation of the risk. The rider in question does not in any sense reduce an indemnity provided for in the policy, hence does not come within the clause requiring a rider to be printed in bold-face type. *Id.*

7. *Presumption of death arising from continuous absence of seven years — General rule and application thereof — Evidence required to establish such presumption.* While it is a general presumption in law that a person who has been continuously absent from his home or place of residence, and unheard from, or of, by those who, if he had been alive, would naturally have heard of him, through the period of seven years, is dead, the burden of establishing the facts which may, within reason, give rise to the presumption is upon the person invoking it. He must prove more than the mere fact of absence during the period, and must produce evidence to justify the inference that the death of the absentee is the probable reason why nothing is known about him. The proof should remove the reasonable probability of his being alive at the time. *Buller v. Mut. L. Ins. Co.* 197

8. *When question of presumption of death one of law.* Whether or not the presumption of death arises from the evidence is almost always, of necessity, a question for the jury. Whenever, however, the evidence is without contradiction and incapable, whether without or with contradiction, of creating, in reasonable minds, conflicting inferences, the question is one of law for the trial justice to decide. *Id.*

9. *Inadequacy of evidence to sustain presumption of death.* Where in an action brought by the beneficiary of a policy of life insurance, who is the mother of the insured, the plaintiff offered no direct evidence of his death, relying upon the presumption of death arising from his absence, unheard of, during more than seven years, and the unconflicting evidence produced by plaintiff shows that the alleged decedent had the definite and fixed intention of not returning to the home of his parents but had formed the purpose of seeking elsewhere the opportunity and location satisfactory to him and conducive to the acquisition of money, and none of the communications to his parents and other facts justify the inference that death is the probable reason why nothing has been heard from, or of, him for seven years, the evidence does not uphold the presumption of death and a judgment for plaintiff entered upon the verdict of a jury cannot be sustained. *Id.*

INSURANCE — Continued.

10. *False statements in application for policy.* The provision of the Insurance Law (Cons. Laws, ch. 28, § 107, as amd. by L. 1913, ch. 155) that the falsity of any statement in the application shall not bar a recovery unless made with intent to deceive applies only to policies issued after January 1, 1914. *Baumann v. Preferred Acc. Ins. Co.* 480

11. *Annual receipt not a reissue of policy.* An annual receipt issued by the company to the insured on the policy issued to him at an earlier date for a period of twelve months, with the privilege of annual renewals, is not in effect a reissue of the policy so as to bring it within the meaning and operation of section 107 of the Insurance Law, as amended in 1913. *Id.*

12. *Provision of section 58 of Insurance Law that policy shall contain entire contract not applicable to accident insurance.* The provision of section 58 of the Insurance Law that every policy of insurance issued or delivered "on or after January 1, 1907, by any life insurance corporation shall contain the entire contract between the parties * * * and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties," is by its express words limited to policies issued "by any life insurance corporation," and has no application to accident insurance. *Id.*

See Glockner v. Great Eastern Casualty Co. (Mem.), 622; *Crogan v. Persion* (Mem.), 653; *Edwards v. Fidelity & Cas. Co.* (Mem.), 659; *Barber v. Equitable Life Ass. Society* (Mem.), 675; *Wachsman v. Travelers' Ins. Co.* (Mem.), 696; *Walcott v. Fidelity & Casualty Co.* (Mem.), 715; *Rakov v. Bankers' Life Ins. Co.* (Mem.), 721.

Claim that insurance policy was assigned by husband to his wife by oral assignment — testimony of person claiming insurance under such alleged assignment not barred under the statute (Code Civ. Pro. § 829) — when evidence to sustain claim under oral assignment not sufficient to show that claimant is entitled to insurance as against beneficiaries named in policy.

See EVIDENCE, 3-5.

Title guaranty — when vendee who at time of execution of contract of sale knew of defect in title cannot recover against drawer of contract and of subsequent deed for failure to protect him — policy of insurance may define "loss" intended to be covered — when owner of real property may insure himself against defects in title of which he had knowledge — when dismissal of counterclaim pleading facts which would entitle insurer to reformation of policy is error.

See NEGLIGENCE, 5-8.

INSURANCE LAW.

Standard provisions for accident insurance policies — not whole contract.

See INSURANCE, 1-3.

Provision that falsity of statement in application for insurance policy shall not bar recovery applies only to policies issued after January 1, 1914 — provision of section 58 that policy shall contain entire contract not applicable to accident insurance.

See INSURANCE, 10-12.

INTEREST.

Improper instruction that jury should add interest to award of damages.

See WATER AND WATERCOURSES, 3.

INTERSTATE COMMERCE.

Natural gas — public service commission — although the transportation of natural gas by pipe lines, from another state to this, is interstate commerce, the price at which such gas is sold within the state is subject to regulation by the public service commission in the absence of Federal regulation.

See GAS AND ELECTRICITY, 5-7.

JUDGMENT.

Public policy — Judgment confessed in favor of defendant to induce her to procure a divorce from plaintiff — Such judgment is against public policy and illegal and cannot be enforced. This action was brought to enjoin the collection of so much of a judgment as remains unpaid and for other relief. The plaintiff, in order to induce the defendant to procure a divorce, which was thereafter obtained, entered into an agreement by which he stipulated among other things that he would confess judgment for a substantial sum as collateral security for the payment of certain moneys to be paid by him from time to time for her support. After making several payments plaintiff refused further to carry out the agreement, defendant having in the meantime remarried. Thereupon she entered judgment upon the confession which she is taking proceedings to collect. Held, that the agreement and confession were illegal. (Domestic Relations Law [Cons. Laws, ch. 14], sec. 51.) They constituted a fraud upon the law, were against public policy, and could not be enforced by legal process, and judgment entered upon the confession occupies no better position. The general rule is that the action being in equity, and each of the parties being equally at fault, they should be left where the court finds them, but it applies only to contracts which have been fully performed. It does not apply where the contract remains in whole or in part executory since the agreement, confession and judgment must be considered together. The invalidity of one involves the invalidity of the others. In so far, however, as performance has been had the general rule should be applied, and the parties left where the court finds them, but to the extent that the judgment has not been collected, the court should interfere and prevent the arrangement being further consummated by the collection of the judgment. *Schley v. Andrews*.

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See *Brinkman v. Cram* (Mem.), 720.

Amendments — costs — clerical errors or omissions in judgments or mistakes in entry thereof may be corrected — court may not by amendment correct errors in substance affecting a judgment or withhold or award costs in a substantive part of a judgment in equity.

See PRACTICE, 1.

LABOR LAW.

Provision prohibiting employment of children under the age of fourteen years — employer equally liable whether child is employed by himself or his agents — must employ reasonable supervision to prevent violation of statute — legislature had power to make violation of statute a criminal offense and provide for punishment by fine.

See CRIMES, 1-4.

LABOR LAW — Continued.

Provision that every vat and pan, the opening of which is below level of elbow of workman, shall be protected — such provision not applicable to a shallow trough set in ground and used for cooling red hot tires in a wagonmaker's shop.

See NEGLIGENCE, 10.

Provision requiring machines used in factories to be guarded — construction and application of such provision — employer not liable for injury from unguarded machine if there is no practicable guard obtainable — evidence examined and held insufficient to sustain verdict against employer.

See NEGLIGENCE, 13.

LANDLORD AND TENANT.

1. *Person other than lessee in possession of leasehold premises — Presumption and evidence that such person is in possession as assignee — When estopped from denying assignment.* Where a person other than the lessee is shown to be in possession of leasehold premises the law presumes that the lease has been assigned to him and that the assignment was sufficient to transfer the term and to satisfy the Statute of Frauds. So also payment of rent by the occupant to the plaintiff when the occupant has been let into possession by the original lessee is *prima facie* evidence of the assignment of the term, and a person in possession who holds himself out to the landlord as assignee is estopped from denying the assignment or objecting that the assignment was not in writing. *Mann v. Munich Brewery.* 189

2. *Annulment of lease by warrant removing tenant — When effect thereof abrogated by agreement of parties.* Usually the issuing of a warrant for the removal of a tenant from demised premises cancels the agreement for the use of the premises and annuls the relation of landlord and tenant. (Code Civ. Pro. § 2253.) The parties may, however, as they did in this case, agree to the contrary and render the lessee liable to the end of the term although out of possession, and an assignee may also contract that he will remain liable after possession has terminated and for the period of the lease. In this case there is evidence justifying the finding that the defendant expressly agreed and undertook to carry out the terms of the lease in question. By such assumption it took upon itself the obligation of the lessee to continue liable for the payment of the rent after the abandonment of the premises or after a final order in summary proceedings, and it is a fair inference from the facts that the assumption was in consideration of the assignment and consent thereto by the landlord. *Id.*

Validity of lien filed against property of landlord for materials furnished and work done in improvements to property made by tenant — when designation of corporate owner of property by original name instead of new corporate name not a misnomer — liens filed against stockholder and director of corporation cannot be enforced as liens against the corporation — laborers cannot enforce liens for unpaid checks delivered to and held by *bona fide* holders.

See LIENS, 2-7.

When evidence of negligence of landlord sufficient to make a case for the jury — elements of damage not alleged in complaint may not be considered.

See EVIDENCE, 7, 8.

LARCENY.

See *People v. Alexander* (Mem.), 717.

LATERAL SUPPORT.

See Rubin v. N. Y. Municipal Ry. Corp. (Mem.), 713.

LEASE.

See Trumbull v. Bombard (Mem.), 638.

Person other than lessee in possession of leasehold premises — presumption and evidence that such person is in possession as assignee — when estopped from denying assignment — annulment of lease by warrant removing tenant — when effect thereof abrogated by agreement of parties.

See LANDLORD AND TENANT, 1, 2.

LIBEL.

1. *When corporation may maintain action for libel without proof of special damage.* A corporation may maintain an action for libel without proof of special damage if the charge is defamatory and injuriously and directly affects its credit or the management of its business and necessarily causes pecuniary loss. *First Nat. Bank v. Winters.* 47

2. *When words libelous per se.* Words accusing a banking corporation of having participated in the sale of intoxicating liquors contrary to law, are libelous *per se.* *Id.*

3. *If words complained of are ambiguous, their meaning and application are question for jury.* In an action for libel where the words complained of may be construed as a charge of larceny but do not necessarily imply and would not necessarily be understood to imply that the plaintiff had been guilty of more than a mistake or of carelessness, the meaning of the words used and their application should be submitted to the jury and it is error for the court to charge that they were libelous *per se* as charging larceny. *Id.*

4. *When entire publication may be shown.* In actions for libel the entire publication may be shown if it leads up to the words said to be actionable, and where an introduction to an article complained of first criticises the president of the plaintiff corporation, then charges him with being opposed to the defendant, and, continuing, gives reasons therefor, among which are contained the alleged libelous words, the introduction is competent, at least as bearing upon the question as to whether the words used might be fairly construed to import a crime or mistake, and its exclusion is erroneous. *Id.*

LIENS.

1. *Mechanics' liens — Fixtures — Lien Law — When electric lighting fixtures furnished and used in the equipment of an office building are included in the "permanent improvement of real property" within meaning of the Lien Law.* The General Construction Law (§ 95) requires the courts to construe the Lien Law as a continuation of the prior law and not as a new enactment, and the Lien Law itself provides (§ 23) that it is to be construed liberally to secure its beneficial interests and purposes. Electric lighting fixtures furnished and used for the purpose of equipping an office building and the labor performed in installing them are included in the term "permanent improvement of real property" as used in sections 2 and 3 of the Lien Law (Cons. Laws, ch. 33; L. 1909, ch. 38) as it read in the year 1910. *Wahle-Philips Co. v. Fitzgerald.* 137

2. *Mechanic's lien — Landlord and tenant — Validity of lien filed against property of landlord for materials furnished and work done in improvements to property made by tenant.* Where the trial court has found, in an action to foreclose a mechanic's lien (Cons. L. ch. 33),

LIENS — Continued.

that the improvements were made with the consent and knowledge of the owner and such finding has evidence to sustain it, a judgment enforcing the lien must be sustained. *Gates & Co. v. Nat. Fair & Exposition Co.* 142

3. *When designation of corporate owner of property by original name instead of new corporate name not a misnomer.* Where in liens filed against real property owned by the "Empire City Racing Association" the name of the owner was stated as the "Empire City Trotting Club," which was the original name under which the owner was incorporated, and the name under which most of its property was acquired, but before the time involved the name had been legally changed to "Empire City Racing Association," such misnomer, although defective, was not a substantial "misdescription of the true owner," and hence the lienors, who gave the name of the owner of the real property as "Empire City Trotting Club," should be deemed to have substantially complied with the Lien Law. *Id.*

4. *Liens filed against officer and stockholder of corporation cannot be enforced as liens against corporation.* Where liens sought to be enforced herein were filed against an officer and stockholder of the "Empire City Racing Association" and actively connected with its management, but who had no personal interest in its real property as an owner, it must be held that this was not a substantial compliance with the statute. *Id.*

5. *When liens filed against corporation and another valid as against corporation.* Liens filed and docketed against "Empire City Racing Association and" another as owners are valid as against the association and were not made valueless and ineffectual by the further docket of said liens as against such other person, who was an officer of the association, as an alleged owner. (Lien Law, § 10.) *Id.*

6. *Laborers cannot enforce liens for value of worthless checks given to them and indorsed and delivered by them to others.* Where worthless checks for work on the improvements were given by the lessee to laborers who, not knowing the checks were worthless, indorsed and delivered them in payment of bills to others who still hold them, such laborers cannot urge their right to file and sustain a lien for their labor accounts so far as they were canceled by the checks so used by them. Such checks still outstanding in the hands of *bona fide* holders represent an indebtedness against the lessee and the holders of the checks have a valid claim against the exposition association. *Id.*

7. *Trustee in bankruptcy holds title subject to liens.* The trustee in bankruptcy of the lessee holds his title subject to the liens filed by materialmen and laborers which were filed within the time prescribed by statute. *Id.*

8. *Contract for furnishing and equipping locker rooms in state capitol — Assignment of such contract to bank as security for loan — State architect proper officer with whom to file assignment — Trustees of public buildings must consent to such assignment — If such consent be not obtained before assignment is filed, the assignment cannot be enforced as against a subsequent mechanic's lien against contractor.* A construction company made a contract with the trustees of public buildings of the state for furnishing and equipping locker and document rooms and for repairs, furnishing and equipping of the assembly chamber in the capitol at Albany. The plaintiff subsequently made an agreement with this company to furnish some of the material and perform some of the work under the first mentioned contract. Later, the construction

LIENS — Continued.

company assigned to the defendant bank the money due and to become due on the contract as security for loans and advances of money to be used in the performance of its contract, which assignment was filed in the state comptroller's office. Thereafter the plaintiff's notice of lien was filed in the office of the state comptroller and the department of the state architect. *Held*, that section 16 of the Lien Law (Cons. Laws, ch. 33) which requires the filing of the assignment of such a contract with the head of the department or bureau having charge of such construction in order that it may have any validity includes an improvement on the real property of the state. *Held, further*, that the state architect is the head of the department having charge of the construction to which the assignment to the defendant bank relates and consequently he is the officer with whom the assignment should have been filed under this section, and that section 19-d of the Public Buildings Law has no application in this case. The Appellate Division found that prior to the delivery of the assignment to the defendant bank, an officer of the construction company took the same to the state architect's office, and the assistant secretary in the architect's office procured the consent of the trustees of public buildings to the assignment and then returned it to the officer of the construction company. *Held*, that the assignment was not filed in the architect's office. *General Fireproofing Co. v. Keepsdry Constr. Co.* 180

9. Question of irregularity of plaintiff's lien, when not considered by Appellate Division cannot be reviewed by Court of Appeals. The defendant bank cannot raise the question that the plaintiff's notice of lien was irregular and invalid. The plaintiff did not appeal from that part of the judgment which held the notice valid and regular. The defendant bank did not appeal from the Special Term judgment at all. The Appellate Division not having considered the question it is not open to review in this court. *Id.*

See Merrick Theatre Co. v. Weissager Amusement Constr. Co. (Mem.), 629; *S. Shanken Metal Ceiling Co. v. Fort Masonry Co.* (Mem.), 632.

LIEN LAW.

Mechanics' liens — fixtures — Lien Law — when electric lighting fixtures furnished and used in the equipment of an office building are included in the "permanent improvement of real property" within meaning of the Lien Law.

See LIENS, 1.

Validity of lien filed against property of landlord for materials furnished and work done in improvements to property made by tenant — when designation of corporate owner of property by original name instead of new corporate name not a misnomer — liens filed against stockholder and director of corporation cannot be enforced as liens against the corporation — laborers cannot enforce liens for unpaid checks delivered to and held by *bona fide* holders.

See LIENS, 2-7.

Assignment of state contract must be filed with head of department having charge of construction.

See LIENS, 8.

LIMITATION OF ACTIONS.

See Fallert v. Mass. Bonding & Ins. Co. (Mem.), 647.

LIQUOR TAX.

See Matter of Sisson v. Decker (Mem.), 677.

LOCAL OPTION.

See O'Keeffe v. Dugan (Mem.), 667.

MALICIOUS PROSECUTION.

See Assets Collecting Co. v. Goldsmith (Mem.), 631.

MARRIAGE ANNULMENT.

See Guiney v. Guiney (Mem.), 718.

MASTER AND SERVANT.

1. *Contract of employment — Compensation of salesman consisting in part of share of net profits — Inventory — Charges of depreciation of stock against profits for year.* In arriving at the net profits of a business for the purpose of determining the compensation of the plaintiff, a salesman, which compensation was in part dependent thereon, defendant charged against such profits sums which represented depreciation during the year of the market value of the stock of goods on hand. *Held*, that in view of the business practice of taking an annual inventory on which the goods on hand appear at the then prevailing value, this custom must be regarded as being contemplated by the parties when this contract was made. *Bolles v. Scheer.* 118

2. *Effect of evidence that such charges were not made in good faith.* Where there was evidence, as in this case, from which an inference might be drawn that the charges made for such depreciation were not made in good faith, it was the duty of the court to pass upon that question. *Id.*

3. *Order of reference cannot be reviewed on appeal from final judgment.* An order of reference is not one which necessarily affects the final judgment and hence cannot be brought up for review on an appeal from the final judgment in the action in which it was granted. (Const. art. VI, § 9; Code Civ. Pro. §§ 190, 191, 1316.) *Id.*

When employer may hold employee as trustee and require him to account for profits of personal transaction — when oral consent of employer to such transaction precludes him from impressing such a trust and acquits employee of breach of written contract forbidding his engaging in business similar to his employer's.

See CONTRACT, 7-9.

Labor Law — provisions prohibiting employment of children under the age of fourteen years — employer equally liable whether child is employed by himself or his agents — must employ reasonable supervision to prevent violation of statute — legislature had power to make violation of statute a criminal offense and provide for punishment by fine.

See CRIMES, 1-4.

Labor Law — provision that every vat and pan, the opening of which is below level of elbow of workman, shall be protected — such provision not applicable to a shallow trough set in ground and used for cooling red hot tires in a wagonmaker's shop.

See NEGLIGENCE, 10.

Place to work — dangerous situation — questions of negligence for jury — erroneous dismissal of complaint.

See NEGLIGENCE, 11.

Labor Law — provision requiring machines used in factories to be guarded — construction and application of such provision — employer

MASTER AND SERVANT — *Continued.*

not liable for injury from unguarded machine if there is no practicable guard obtainable — evidence examined and held insufficient to sustain verdict against employer.

See NEGLIGENCE, 13.

Action under Employers' Liability Act — erroneous reversal by Appellate Division of judgment for plaintiff on ground that defendant was not guilty of negligence as matter of law — effect of reversal of decision of Appellate Division by Court of Appeals.

See NEGLIGENCE, 15.

Claimant injured while visiting another workman across the room from place where claimant was employed — accident did not arise out of or in course of employment.

See WORKMEN'S COMPENSATION, 1.

Claimant injured while walking upon tracks in railroad yard instead of adjacent and convenient highway — when accident did not arise out of and within course of employment.

See WORKMEN'S COMPENSATION, 2.

MECHANIC'S LIEN.

Fixtures — Lien Law — when electric lighting fixtures furnished and used in the equipment of an office building are included in the "permanent improvement of real property" within meaning of the Lien Law.

See LIENS, 1.

Validity of lien filed against property of landlord for materials furnished and work done in improvements to property made by tenant — when designation of corporate owner of property by original name instead of new corporate name not a misnomer — liens filed against stockholder and director of corporation cannot be enforced as liens against the corporation — laborers cannot enforce liens for unpaid checks delivered to and held by *bona fide* holders.

See LIENS, 2-7.

Irregularity of lien.

See LIENS, 8.

MONEY LOANED.

Stock subscriptions — construction of agreement proposed to be entered into by a syndicate composed of subscribers of bonds to be issued to build a proposed railroad and the railroad promoters as managers of the proposed syndicate — when such agreement signed by only one subscriber for bonds does not authorize promoters to borrow money on strength of such subscription — when subscriber who is not liable for such loan may have agreement and subscription canceled.

See CONTRACT, 11.

MOTOR VEHICLES.

Violation of statute (Highway Law, ch. 30, § 290, subd. 3) requiring person who injures the person or property of another in operating an automobile to give his name and other facts to the injured person or a designated officer — evidence — *res gestæ* — when declaration of injured person admissible in evidence upon trial of defendant indicted for violation of said statute.

See CRIMES, 10.

MOTOR VEHICLES — *Continued.*

New York (city of) — when officers and men of fire department not exempt from limitations in respect of speed — action against fire commissioner for injuries from automobile in which he was being driven by fireman — commissioner not exonerated as of course.

See NEGLIGENCE, 1, 2.

Incorporated villages may by ordinance limit the speed of automobiles and provide that violation of ordinance is a misdemeanor punishable by a fine and imprisonment if fine is not paid — false arrest — action for false arrest of person violating such an ordinance cannot be maintained.

See VILLAGES.

MUNICIPAL CORPORATIONS.

South Glens Falls (village of) — contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years — increase of such rates by company on the ground that they have become insufficient and confiscatory owing to increased cost of production — power of public service commission to regulate such rates.

See GAS AND ELECTRICITY, 4.

Streets and sidewalks — New York (city of) — requirement of charter that notice of intention to bring action for injuries, caused by negligence of the city, must be filed with the corporation counsel — when letters detailing accident and making claim for damages mailed to finance department and by it delivered to corporation counsel constitute sufficient notice and filing thereof.

See NEGLIGENCE, 12.

MURDER.

See People v. Verrino (Mem.), 681; People v. Ferraro (Mem.), 686.

Appeal — non-unanimous decision of Appellate Division affirming a judgment of conviction — Court of Appeals must examine record to ascertain whether there is evidence tending to support verdict of guilty — erroneous reason for receiving competent and admissible evidence not sufficient ground for reversal of judgment — when statements made by witness admissible as explanatory of the conduct and acts of the witness.

See CRIMES, 5-7.

NARCOTIC DRUGS.

Sale of heroin to infant in violation of statute — when mother dependent upon earnings of minor son can maintain action against druggists who sold heroin to him whereby his health was ruined and his services lost — compensatory damages, only, can be recovered — punitive damages not allowed in common-law action by third person.

See PARENT AND CHILD, 1-4.

NATURAL GAS.

Interstate commerce — public service commission — although the transportation of natural gas by pipe lines, from another state to this is interstate commerce, the price at which such gas is sold within the state is subject to regulation by the public service commission in the absence of Federal regulation.

See GAS AND ELECTRICITY, 5-7.

NAVIGABLE WATERS.

Injury to boat and cargo through failure of contractor to mark shoal in newly-excavated part of Erie canal — erroneous charge as to defendant's negligence and plaintiff's freedom from contributory negligence — improper instruction that jury must add interest to award of damages

See WATER AND WATERCOURSES, 1-3.

NEGLIGENCE.

1. *New York (city of) — When officers and men of fire department not exempt from limitations in respect of speed.* Officers and men of the fire department of the city of New York are not exempt from the ordinary limitations in respect of speed, unless they are proceeding to a fire (New York Charter, § 784), or are responding for emergency work in case of fire, accident, public disaster or impending danger. (Code of Ordinances of New York, chap. 24, art. 2, § 19, subd. 1.) *Dowler v. Johnson.* 39

2. *Action against fire commissioner for injuries from automobile in which he was being driven by fireman — Commissioner not exonerated as of course.* In an action against the fire commissioner of the city of New York to recover for personal injuries alleged to have been sustained by plaintiff through a collision with the automobile in which the commissioner was being driven by a fireman upon a tour of inspection, it was error to exclude testimony that the automobile was being driven at excessive speed on the theory that because the relation between the defendant and the driver was not that of master and servant, no speed, however excessive, could tend to fasten upon the defendant a liability for the wrong. If the defendant permitted an excessive speed to be maintained, after reasonable opportunity for protest, a jury might find his silence equivalent to approval, and ratification may be equivalent to command. The defendant had a right to restrain the driver who was subject to his orders and he is not exonerated as of course because the driver was not his servant. *Id.*

3. *Railroad crossing accident — Degree of care required of traveler approaching railroad crossing.* It is not the law that as a distinct and conclusive circumstance one traveling on the highway must assume that no warning of the approach of trains will be given at a railroad crossing and relax in no degree his vigilance although silence suggest security, nor is it the law that one who has once looked from a proper viewpoint must, at his peril, look again before proceeding. *Carr v. Pennsylvania R. R. Co.* 44

4. *Question of contributory negligence ordinarily one for jury — Erroneous dismissal of complaint.* Where in an action to recover for injuries received through being struck by a train at a railroad crossing the evidence indicates that plaintiff approached with his horse under control and his mind on the danger; that he listened and heard nothing; that he looked down the track and saw as much as seven hundred feet at a point when he was only a few seconds from the crossing; that no train was then in sight and that he then looked the other way and immediately the accident happened, it cannot be said, as matter of law, that his negligence was palpable, and, therefore, a dismissal of the complaint on that ground was erroneous. *Id.*

5. *Title guaranty — When vendee who at time of execution of contract of sale knew of defect in title cannot recover against drawer of contract and of subsequent deed for failure to protect him.* Where, in an action to recover for the alleged negligence of defendant, a title guarantee company, for error in drawing a contract for the purchase of real

NEGLIGENCE — *Continued.*

property and the subsequent deed, whereby the plaintiff, its employer, became liable to pay certain assessments, it appears by uncontradicted evidence that at the time the contract of sale was made the plaintiff knew of the assessments, the complaint is properly dismissed, since, knowing the facts, the negligence of the defendant, if there was any, in no way injured the plaintiff. *Empire Development Co. v. Title G. & Trust Co.* 53

6. *Policy of insurance may define "loss" intended to be covered.* While every policy of insurance is so far a contract of indemnity that the insured must possess an insurable interest and that wagers are prohibited, there is no fundamental objection to definition between the parties to an insurance contract of the loss which they intend to cover, so long as it is made in good faith and not as merely the cover of a wager. *Id.*

7. *When owner of real property may insure himself against defects in title of which he had knowledge.* The words "loss or damage" in a policy insuring the owner of real property against loss by reason of defective title thereto and other incumbrances thereon can only mean damages caused to the owner by an existing defect in the title. Hence, it is error to dismiss the complaint in an action against the insurer to recover the amount of assessments paid by the insured because the latter knew that at the time title passed and the policy was dated the lien of such assessments had been perfected. Against the payment of these liens the owners had a right to secure themselves and the mere knowledge by them of the defect did not constitute a defense. *Id.*

8. *When insurer entitled to reformation of policy.* Where, however, undisputed evidence shows that both parties knew of the assessment and that the issuance of the policy was delayed and an agreement made that the particular assessment should not be excepted from the policy because of the promise of the plaintiffs that they would pay the same and have it canceled and thereafter the assessment was paid by the plaintiffs and the policy was issued but its date was given as before the payment, the defendant is entitled to a reformation of the policy so as to relieve it from paying this particular assessment, and where such a defense was pleaded as a counterclaim its dismissal was error. *Id.*

9. *Sidewalks — Liability of property owner for failure to keep sidewalk in repair as required by charter of city — Party injured by defective sidewalk may bring suit directly against negligent owner.* The charter of the city of Auburn imposes a statutory obligation upon the owner of property abutting a public street in that city "to make, maintain and repair the sidewalk adjoining his lands." The statute also prescribes the liability of the owner for a failure to perform the legal obligation so enjoined by enacting that such owner shall be liable for any injury or damage, by reason of omission, failure or negligence to make, maintain or repair such sidewalk or for a violation or non-observance of the ordinances relating to making, maintaining and repairing sidewalks. (L. 1879, ch. 53, § 113; L. 1897, ch. 172.) The complaint alleged that plaintiff sustained severe personal injuries due to the negligence of defendant in failing to maintain and keep in repair a plank sidewalk on which plaintiff was lawfully traveling. By reason of the failure of the defendant to perform the statutory duty imposed upon him the rights of the plaintiff were violated and loss and harm inflicted upon her, and she was not required to first institute an action

NEGLIGENCE — *Continued.*

against the city. She was, if so advised, privileged to do so, or, as she elected, to bring suit directly against the defendant owner. *Willis v. Parker.* 159

10. *Labor Law* — *Provision that every vat and pan, the opening of which is below level of elbow of workman, shall be protected* — *Such provision not applicable to a shallow trough set in ground and used for cooling red hot tires in a wagonmaker's shop.* The Labor Law (Cons. Laws, ch. 31, § 81, subd. 1) provides that every vat and pan wherever set so that the opening or top thereof is at a lower level than the elbow of the operator or operators at work about the same shall be protected as therein set forth. The complaint alleges that plaintiff was in the employ of the defendant at the shop and place of business of the defendant and that he and another workman were engaged in *cooling off in a trough* or hole full of water a red hot tire which had just been placed on a wheel; that in the course of the work of cooling off the tire the water in the trough would absorb the heat from the tire and would then become warmer and warmer and would be changed at intervals during the course of the work by adding cold water which was obtained from a sink near the trough; that while so engaged in his work he slipped and his left foot and leg went into the trough while it contained boiling hot water and he sustained the injuries for which he seeks to recover in this action. It is also alleged in the bill of particulars that by reason of the pipes being frozen it was impossible to obtain cold water. The defendant is a wagonmaker and maintains a shop in which he performs his work and in which plaintiff was employed. The trough is a wooden box set in the ground so that the top of it is even with the surrounding flag or brick floor. It has been maintained in the same manner during the twenty-three years that the defendant has maintained his business at the place where the injury occurred. *Held*, that such a trough is not a vat or pan within the meaning of the statute, and that there is nothing obviously or inherently dangerous in this trough nor was such an accident reasonably to be anticipated. *Levberg v. Schumacher.* 167

11. *Master and servant* — *Place to work* — *Dangerous situation* — *Questions of negligence for jury* — *Erroneous dismissal of complaint.* Where the place in which the work was to be performed was prepared by the master and furnished by it to the servant and there was a dangerous situation, apparent if any reasonable inspection was given, in an action by the servant to recover for injury the question of defendant's negligence and of plaintiff's contributory negligence should be submitted to the jury. Plaintiff, a moving picture actress, was taken to a wood by her employer and required to stand on a limb of a tree, a few feet from the ground. She was then instructed to drop to the ground and assured that "everything is perfectly safe." On striking the ground her foot came in contact with a partly covered root, resulting in a fracture. *Held*, that in an action to recover for such injury it was error to dismiss the complaint. *Turner v. Crystal Film Co.* 268

12. *New York (city of)* — *Requirement of charter that notice of intention to bring action for injuries, caused by negligence of the city, must be filed with the corporation counsel* — *When letters detailing accident and making claim for damages mailed to finance department and by it delivered to corporation counsel constitute sufficient notice and filing thereof.* When it is said in a statute that a paper must be filed with an officer the requirement is complied with when the party delivers that paper to the officer at his official place of business and there leaves it with him. Whether he does this personally or by mail is

NEGLIGENCE — Continued.

immaterial, so long as it is actually received. Plaintiff was injured, as she says, by stumbling over a defective cover of a hole in the sidewalk on the side of Pacific street near the Twenty-third Regiment Armory. Plaintiff's father wrote the finance department of the city, giving the time of the accident and adding: "There is a coal or vent hole in the sidewalk over which has been placed a wooden cover which protrudes two or more inches above the sidewalk, one portion of which is broken off." Plaintiff's father again wrote referring to the accident, complaining of the delay, stating that if he heard nothing within a few days he would be obliged to place the matter in the hands of an attorney. Both of these letters were received by the finance department and came into the possession of the corporation counsel. Both letters were written at the plaintiff's request and on her behalf, within six months after the accident. The complaint was dismissed on the ground that the notice given was not sufficient. It is claimed that the complaint is defective in that it failed to allege that thirty days had elapsed since the demand was presented to the comptroller and that he thereafter for thirty days refused to make any adjustment of the claim. Such a statement should have been included in the complaint, but proof of both of these facts was received without objection. *Held*, that with this evidence in the case, the complaint should be deemed amended to conform to the proof. *Held, further*, that the point of the accident was clearly and definitely indicated and the letters sufficiently stated an intention to sue the city in case the claim was not settled. Hence the complaint should not have been dismissed. *Sweeney v. City of New York.* 271

13. *Labor Law — Provision requiring machines used in factories to be guarded — Construction and application of such provision — Employer not liable for injury from unguarded machine if there is no practicable guard obtainable — Evidence examined and held insufficient to sustain verdict against employer.* The statute (Labor Law, § 81, subd. 1) requiring machinery and machines used in a factory to be guarded has application only to machines and machinery which it is practicable to guard and from which, unguarded, injuries to employees may reasonably be apprehended. In order to hold an employer liable for failure to comply with the statute, there must have been a practicable guard which could have been acquired by him. Where in an action to recover for injuries suffered by plaintiff, it was claimed that the machine by which they were inflicted was not properly guarded, and it appeared that there was not in the market or procurable or contrivable by defendant any guard for the machine, the testimony of a witness descriptive of a guard which never had existed or been obtainable or known to or contrivable by the defendant, raised no real conflict in the evidence and could not be adopted by the jury as the basis of a verdict for plaintiff. *Michalski v. Am. M. & F. Co.* 294

14. *Street railways — Horses attached to truck, transporting pile driver through street, killed by electricity passing from trolley wires through truck — Whether railroad company was negligent in failing to raise wires to prevent accident question for the jury — Contributory negligence of persons driving truck question for the jury.* The moving of a pile driver sixteen feet high, loaded upon a truck and drawn by fourteen horses through a street occupied by the tracks and trolley wires of a street railroad, is not necessarily an unreasonable use of the street. Where the railroad company, having been notified by the truckmen moving the pile driver that they intended to take it through the street, sent a wrecking wagon and a gang of men to lift the wires and prevent injury to its wires or to the men and horses engaged in moving the pile driver, the railroad was not a mere volunteer, but

NEGLIGENCE — *Continued.*

was performing its legal duty. In an action brought by the owner of the truck and horses against the railroad company for the value of horses killed by electricity passing through the truck, it appears that plaintiff's employees in charge of the truck hesitated for fear of collision with the trolley wires. The foreman of the defendant urged plaintiff's employees to go on and assured them that the wires would be raised if necessary, saying: "We are here and we will protect you, what more do you want." Relying upon such assurances, plaintiff's employees proceeded, and the truck came into contact with the trolley wire whereby electricity from it passed through the truck and killed some of the horses attached thereto. *Held*, that the order of the Appellate Division reversing the judgment for plaintiff and dismissing the complaint is erroneous; that it was a question for the jury whether the defendant's servants were not negligent in stating that they could and would lift the wire if the danger became imminent and in inviting plaintiff's servants to drive on, when, as defendant's servants now say, that was an impossible thing for them to do. The question of plaintiff's contributory negligence was, also, for the jury. *Chace Trucking Co. v. Richmond L. & R. R. Co.* 435

15. *Master and servant* — *Action under Employers' Liability Act* — *Erroneous reversal by Appellate Division of judgment for plaintiff on ground that defendant was not guilty of negligence as matter of law.* Upon examination of the evidence in an action for negligence brought by a servant against the master under the Employers' Liability Act, *held*, that a question of fact was presented for determination by a jury as to the actionable negligence of the defendant in the method adopted for doing the work in question; as to whether or not the plant was defective, in that there existed on the part of defendant a failure to supply proper apparatus and adopt such measures as would reasonably guard against an obvious danger which might arise from the method adopted, and that the Appellate Division was in error in determining as matter of law that the defendant was not guilty of negligence. *Gilhooley v. Burgard.* 445

See Kroenke v. Johnson (Mem.), 619; *Redding v. City of New York* (Mem.), 628; *Sprada v. International Ry. Co.* (Mem.), 634; *Boyle v. Mallory Steamship Co.* (Mem.), 639; *Kopances v. Ocean Steamship Co.* (Mem.), 655; *Barber v. Case & Son Manfg. Co.* (Mem.), 656; *Cook v. People's Milk Co.* (Mem.), 661; *Hyde v. N. Y. C. & H. R. R. Co.* (Mem.), 680; *Young v. International Motor Co.* (Mem.), 690; *Kern v. Stuckewicz* (Mem.), 692; *McDonald v. Mohawk Gas Co.* (Mem.), 704; *Zenner v. Brooklyn Heights R. R. Co.* (Mem.), 711; *Tobin v. Yonkers Electric Light & Power Co.* (Mem.), 714; *Waldorf Astoria Hotel Co. v. City of New York* (Mem.), 722; *Maitland v. City of Watertown* (Mem.), 726; *Kettell v. Erie R. R. Co.* (Mem.), 727; *Jensen v. Cauldwell Wingate Co.* (Mem.), 729.

When evidence of negligence of landlord sufficient to make a case for the jury.

See EVIDENCE, 7.

Navigation — injury to boat and cargo through failure of contractor to mark shoal in newly-excavated part of Erie canal — erroneous charge as to defendant's negligence and plaintiff's freedom from contributory negligence — improper instruction that jury must add interest to award of damages.

See WATER AND WATERCOURSES, 1-3.

NEGOTIABLE INSTRUMENTS.

Payment of checks by bank after payment thereof stopped by drawer — in absence of ratification of such payment bank is liable therefor to the drawer.

See **BILLS, NOTES AND CHECKS.**

NEW YORK (CITY OF).

When officers and men of fire department not exempt from limitations in respect of speed — action against fire commissioner for injuries from automobile in which he was being driven by fireman — commissioner not exonerated as of course.

See **NEGLIGENCE, 1, 2.**

Streets and sidewalks — requirement of charter that notice of intention to bring action for injuries, caused by negligence of the city, must be filed with the corporation counsel — when letters detailing accident and making claim for damages mailed to finance department and by it delivered to corporation counsel constitute sufficient notice and filing thereof.

See **NEGLIGENCE, 12.**

NOTICE.

Streets and sidewalks — New York (city of) — requirement of charter that notice of intention to bring action for injuries, caused by negligence of the city, must be filed with the corporation counsel — when letters detailing accident and making claim for damages mailed to finance department and by it delivered to corporation counsel constitute sufficient notice and filing thereof.

See **NEGLIGENCE, 12.**

NUISANCE.

See *Riverdale Realty Co. v. City of New York* (Mem.), 683.

OFFICERS.

Village officers — when attorney employed by village at annual salary an employee of the village and not a public officer thereof — when entitled to compensation although all officers of village discharged when it became incorporated as a city.

See **CONTRACT, 5.**

PARENT AND CHILD.

1. *Right of parent to recover for loss of services of infant child — When contributory negligence of child no defense.* The right of a parent to recover for loss of services of an infant child has long been recognized at common law, and while it is a general rule that damages will not be permitted if the evidence shows that the child's negligence was the efficient cause of the injury, yet if the conduct of the defendant in such a case was so deliberate, persistent and intentional as to be equivalent in law to positive and willful injury the contributory negligence of the child is not a defense. *Tidd v. Skinner.* 422

2. *When mother may recover against druggist who sold heroin to her son whereby his health was ruined and his services lost.* This action is brought by a widow to recover damages for loss of the services of her son, which she alleges were caused by the defendants by the sale to him of heroin which is a poison within the provisions of the Public Health Law (Cons. Laws, ch. 45, § 238) as it existed prior to the amendment by chapter 502 of the Laws of 1915. The statute also prohibits the delivery of the poison by the seller without satisfying himself that the purchaser is aware of its poisonous character and

PARENT AND CHILD — Continued.

that the poison is to be used for a legitimate purpose. A violation of this provision is a misdemeanor. (Penal Law, § 1743.) The defendants failed to obey these statutes by selling the drug to plaintiff's son in large quantities, knowing that heroin, except as a medicine used in very small quantities and under the direction of a physician, is a poison dangerous to human life. The facts alleged in the complaint and which the jury might have found from the evidence justify a verdict for the plaintiff. *Id.*

3. *Exceptions to charge and to refusals to charge.* As to several exceptions to the charge, refusals to charge and modifications of defendants' requests to charge, they must be read with all that was said by the court in connection therewith and with the facts necessarily found by the jury. As so read no question of controlling importance is presented. *Id.*

4. *Compensatory damages only may be recovered.* The court directed the jury that in case they found a verdict for the plaintiff they should find separately as to the compensatory damages and as to the punitive damages. The defendants raised the question that punitive damages could not be awarded. *Held*, that the weight of reason and authority is in favor of confining the damages to be recovered in an action by a third party to compensation for the pecuniary injury actually sustained. Hence, the judgment is modified by reducing the amount of the recovery to the amount found for compensatory damages. *Id.*

PENAL LAW.

§ 1275 — Penalty for violation of Labor Law.

See CRIMES, 1, 3.

§§ 2175, 2177 — Seduction under promise of marriage — corroboration.

See CRIMES, 8, 9.

PERSONAL PROPERTY LAW.

Implied warranty as to wholesomeness of food.

See FOOD, 1.

PLEADING.

1. *Assignment of interest in estate — Delivery to executor in escrow — Complaint alleging that executor wrongfully filed such assignment states cause of action.* The complaint alleges that plaintiff, at the request of a brother who was executor of their father's will, assigned to two other brothers all of his interest in his father's estate upon the understanding and agreement that the assignment was not to have a legal inception until such time as plaintiff should direct a delivery of the same to the assignees; that in violation of such terms, without notice to or knowledge of plaintiff, the executor filed the same together with his final account as executor in Surrogate's Court and claimed that a portion of the payments made by him to the two assignees was made pursuant to the assignment. On demurrer, *held*, that although insufficient to support a charge of fraud or to justify cancellation of the instrument, the pleading states facts sufficient to constitute a cause of action against the executor. *Hull v. Hull.* 342

2. *When failure of assignor to raise question upon judicial settlement a bar to the action.* Under section 2472a of the Code of Civil Procedure (in effect May 5, 1914), enlarging the jurisdiction of a Surrogate's Court, it was clothed with jurisdiction upon a judicial settlement of the accounts of an executor "to ascertain the title to any legacy or dis-

PLEADING — *Continued.*

tributive share" and "to exercise all other power legal or equitable necessary to the complete disposition of the matter." Hence, upon the judicial settlement of the accounts of the executor, the plaintiff, having been made a party thereto, was at liberty to file objections to the account presented by the executor and contest the validity of any payments made by him under or by reason of the assignment in question and to assert title in himself to the legacy and to have the question of title to the same determined in that proceeding, and where he omitted to assert his legal rights upon such settlement, the decree of the Surrogate's Court thereon is conclusive evidence against him that the items allowed to the executor for moneys paid to legatees were correct and a defense setting up the decree made on the judicial settlement is sufficient to constitute a bar to the maintenance of this action. A demurrer to such defense, therefore, was properly overruled, but as the complaint states a cause of action on contract against the executor, the plaintiff should be permitted to withdraw his demurrer. *Id.*

3. *When demurrers to separate defenses alleging counterclaims properly overruled* — *When error to grant judgment for amount of counterclaims.* A demurrer to separate defenses set up in the answer of the defendant executor alleging counterclaims against the plaintiff in favor of said defendant was properly overruled. The complaint alleged a contractual relationship between the plaintiff and said defendant, and a breach thereof by the latter. The counterclaim stated a cause of action on contract existing at the commencement of the action. It was error, however, to grant judgment in favor of such defendant for the amount of the counterclaims. The only question presented by the demurrer was whether or not the counterclaims were properly alleged as such and of the character specified in section 501 of the Code of Civil Procedure. *Id.*

4. *Defendant not at liberty to challenge sufficiency of complaint on argument of demurrer to separate defense contained in answer.* A demurrer to a separate defense contained in the answer of one of defendant assignees which stated not only a cause of action arising out of the transaction set forth in the complaint and connected with the subject-matter of the action, but likewise a cause of action upon contract existing at the commencement of the action, was properly overruled, but though the complaint fails to state a cause of action against said defendant, the court was in error in dismissing the complaint as against him and awarding him final judgment on the counterclaim, as he was not at liberty to challenge the sufficiency of the same on the argument of that demurrer. *Id.*

5. *Foreign laws are facts which must be proved, but their construction and effect are questions for the court.* Although full faith and credit shall be given in each state of the United States to the public acts, records and judicial proceedings of every other state (U. S. Const. art. 4, § 1), no court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice, but when, after proof is given, the questions involved depend upon the construction and effect of a statute or judicial opinion they are for the court and not questions of fact at all. *Hanna v. Lichtenhein.*

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6. *When law of foreign state may be question for jury.* On a trial of an issue of fact when the evidence furnished is conflicting or inconclusive the law of a foreign state may be a question for the jury although ordinarily when the evidence is all furnished it is the function of the judge to decide as to the law of a foreign state. *Id.*

PLEADING — *Continued.*

7. *Allegation in pleading of law of foreign state is admitted by demurrer.* An allegation in a pleading of the law of a sister state is an allegation of fact which is admitted by a demurrer. If the pleading sets forth in detail the statutes and decisions relied upon by the pleader, the question becomes one of law and should be determined as such by the court in deciding the demurrer. A demurrer does not admit the interpretation placed by a pleader upon the statutes and decisions specifically referred to or incorporated in a pleading. *Id.*

8. *When demurrer to defense alleging foreign law should be overruled.* When the allegations of a defense are general and by such allegations the law of foreign states named is stated to be as in the defense alleged, and the statutes or judicial decisions upon which the allegations are based are not before the court from which a conclusion of law can be reached, the demurrer should be overruled, with leave to plaintiff to withdraw the demurrer and leave the questions raised upon the pleadings for determination at the Trial Term. *Id.*

PLEDGE.

1. *Stock pledged to secure payment therefor — When dividends declared on stock are cash and should be applied on the indebtedness — Sale of pledged stock with accumulated dividends thereon unlawful — Rights and remedies of pledgor.* Under ordinary circumstances it is the right of a pledgee of stock to collect dividends declared thereon and it is his duty to apply them to the reduction of the indebtedness for which the stock is held as security. He represents not only his own interests as pledgee but also holds a duty to the pledgor. Where dividends have been declared on stock but have not yet become payable a proper sale of the stock would necessarily be made with the forthcoming dividend still on it. But where dividends declared have been paid and have passed into the possession of the pledgee they are not a subject of sale. Plaintiff's assignor subscribed for shares of the capital stock of the corporation of which defendant was president. He did not pay for the stock which was issued to him and in his name, but instead gave his notes to the corporation therefor and the stock was left with and held by the corporation as security for the payment of the notes. The corporation declared dividends upon this stock, and these dividends were for a time either paid to plaintiff's assignor or applied on his indebtedness. Thereafter dividends declared on the stock, and which were represented by checks, were placed by the corporation in a special account and the checks held by it without application to such indebtedness until the dividends amounted to a considerable sum. Disagreements having arisen, plaintiff's assignor was discharged from defendant's employ and defendant by a notice signed in the name of the corporation notified the assignor that at a given time and place there would be sold the stock theretofore pledged "together with the rights to uncollected dividends" from a given date. Applying the dividends at their full amount and value the stock was sold for less than it was worth. Plaintiff's rights were based upon an assignment to her by the pledgor subsequent to this sale. *Held*, that the defendant was guilty of conversion. These dividends had been detached from the stock and had become cash or the equivalent of cash which could not lawfully be sold. His misconduct infected the sale of the pledged stock, which under proper conditions might have been sold. Inasmuch as part of the entire transaction was unlawful the whole of it necessarily becomes so. Defendant was chargeable with knowledge of the law which condemned the step which he was about to take and the pledgor did no act which enticed him to believe that the act was lawful or that his conduct would be accepted and acquiesced in.

PLEDGE — *Continued.*

Neither was there any such delay of action by the pledgor or the plaintiff as to sustain a conclusion of law that there was acquiescence in what had been done and a waiver of rights which might have existed: *Brightson v. Clafin.* 469

2. *Measure of damages.* The real damages as the case now stands are those which the pledgor suffered by reason of an improper and unlawful sale as the result of which there was realized a smaller sum than should have been realized for application on his indebtedness or for restoration to him in case there was a surplus over and above the indebtedness. *Id.*

POISONS.

Sale of heroin to infant in violation of statute — when mother dependent upon earnings of minor son can maintain action against druggists who sold heroin to him whereby his health was ruined and his services lost — compensatory damages, only, can be recovered — punitive damages not allowed in common-law action by third person.

See PARENT AND CHILD, 1-4.

PRACTICE.

1. *Amendments — Judgments — Costs — Clerical errors or omissions in judgments or mistakes in entry thereof may be corrected — Court may not by amendment correct errors in substance affecting a judgment — To withhold or award costs is a substantive part of a judgment in equity.* A trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting a judgment. It cannot, by amendment, change a judgment in matter of substance for error committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal. This rule is not in conflict with the provisions of sections 723 and 724 of the Code of Civil Procedure. Those provisions are not intended to affect the substantial rights of parties. Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment. A provision withholding or awarding costs is a substantive part of a judgment in an action in equity and cannot be amended. *Herpe v. Herpe.* 323

2. *Special appearance — Demand for copy of the complaint in an action is not an appearance, either general or special — Motion to dismiss complaint for failure to serve denied.* A defendant may appear specially in an action only for the purpose of raising the question whether the court has obtained jurisdiction over him personally or through his property. A demand for a copy of the complaint is not an appearance, either general or special. Defendant's general appearance can be made only in the manner indicated in section 421 of the Code of Civil Procedure. A defendant who has appeared specially for the purpose of obtaining a copy of the complaint is not in a position to move to dismiss the complaint if no complaint is served. (§§ 479, 480.) *Mustusky v. Lehigh Valley Coal Co.* 584

Assignment of interest in estate — delivery to executor in escrow — complaint alleging that executor wrongfully filed such assignment states cause of action — when failure of assignor to raise question

PRACTICE — Continued.

upon judicial settlement a bar to the action — demurrers to such defense and to counterclaims when overruled — plaintiff permitted to withdraw demurrers.

See PLEADING, 1-4.

Statement of foreign law set forth as a defense in an action — when question of fact which may be admitted by demurrer — when statement of statutes and decision of foreign state presents question of law for the court.

See PLEADING, 5-8.

PRINCIPAL AND AGENT.

1. *When agent of surety company who received money for company not liable for moneys which the company refused to repay after the agency had terminated.* Defendant, who was agent for a surety company, by the consent of his principal deposited moneys received by him for his principal in a bank account which stood in the name of himself and a former partner, then dead, as managers, transmitting such moneys to his principal, usually at the end of the month. Plaintiff placed in the hands of the defendant the moneys, to recover which this action was brought, in order to secure such principal for its obligations upon a bond given by it on plaintiff's behalf, as an administratrix, such moneys passing into the bank account of defendant and there was no understanding or arrangement that the identical fund was to be preserved intact or that it was to be placed in a special account. The defendant's principal refused to repay these moneys to plaintiff after defendant's agency had terminated and this action was brought against defendant to recover them in conversion. *Held*, upon examination of the evidence that the facts are not sufficient to sustain a judgment for plaintiff. *Sagone v. Mackey.* 594

2. *False promise made with intent to break same.* A promise made for the pecuniary advantage of the promisor, with the present intention to break it, may be deemed to be the false statement of a material existing fact because it falsely represents the state of promisor's mind and the state of his mind is a fact. Remedial liability may arise from such an unqualified falsehood when loss results therefrom. *Deyo v. Hudson.* 602

3. *When principal not liable for fraud of agent.* Where a principal, in ignorance of his agent's wholly collateral fraud, retains what appears to be the legitimate proceeds of a transaction, that is not enough to bind him as by a ratification. If a principal authorizes his agent to make a sale and the agent, on his own responsibility, aids a buyer in embezzling the purchase money or in swindling some one out of it, the mere receipt and retention of the money by the principal in ignorance of such wrongful acts may not bind him to repay the proceeds of the theft. *Id.*

4. *When evidence insufficient to show authority of agent or that his acts were ratified by principal.* The plaintiffs are a law firm practicing in a city in which the defendants, stockbrokers, have a branch office in charge of an agent as manager. A junior member of this law firm opened an account in defendants' branch office and speculated on margins, losing money belonging to the plaintiffs and their clients. He confessed to the senior member of his firm and his speculations were made good. After that the senior member of plaintiffs' firm interviewed the manager of the defendants' branch office and told him that they were considering retaining the junior partner in their firm but would not if he continued to speculate in defendants' office,

PRINCIPAL AND AGENT — Continued.

and asked defendants' agent to let them know if the junior partner came back to do any more trading, which defendants' manager promised to do. Thereafter the manager not only failed to inform the plaintiffs that the junior partner was trading in defendants' office but effectively aided him in concealing the fact, and on one occasion positively assured the senior partner of plaintiffs that the junior partner had not resumed trading. Plaintiffs sue to recover from defendants the loss that they have sustained by the junior partner's defalcations. Upon examination of the record it appears that there is no evidence that defendants authorized their agent to make false representations to plaintiffs or that he was held out as having such authority, or that it was within the scope of his employment, and there is no evidence that, by subsequent words or conduct, the defendants ratified his acts. *Id.*

5. *Bounds of legal liability are reasonable and probable consequences of breach of duty.* The bounds of legal liability are the reasonable and probable consequences of a breach of duty. If the broken false promise of a stockbroker's agent to give a law firm notice if a member of such firm, previously dishonest through stock speculation, resumes trading with the branch office where he lost the money, he embezzled may be regarded as the act of the principals, the principals are not liable when the proximate cause of future stealings by such partner from the firm clients is the subsequent negligence of the law firm in failing to exercise reasonable care to prevent further defalcations. *Id.*

Election of remedies — sale of goods to an agent of an undisclosed principal — attempt to recover value of goods from agent after seller has knowledge of all the facts of the agency.

See ELECTION.

PROSTITUTION.

See *People v. Gregory* (Mem.), 631.

PUBLIC HEALTH LAW.

Sale of heroin to infant in violation of statute — when mother dependent upon earnings of minor son can maintain action against druggists who sold heroin to him whereby his health was ruined and his services lost — compensatory damages, only, can be recovered — punitive damages not allowed in common-law action by third person.

See PARENT AND CHILD, 1-4.

PUBLIC SERVICE CORPORATIONS.

Power of courts to regulate rates.

See GAS AND ELECTRICITY, 1-3.

PUBLIC SERVICE COMMISSIONS LAW.

Common-law rule that charges of carrier shall be reasonable — effect of provisions of statute relating to charges of common carriers — effect of ruling of commission that charges were excessive and that shipper was entitled to recover them — such charges cannot be recovered in common-law action on ruling of commission if paid without objection or protest.

See CARRIERS, 2-5.

Contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years — increase of such rates by company on the ground that they have become insufficient and con-

PUBLIC SERVICE COMMISSIONS LAW — *Continued.*

fiscatory owing to increased cost of production — power of public service commission to regulate such rates.

See GAS AND ELECTRICITY, 4.

Price at which natural gas is sold within state subject to regulation by public service commission.

See GAS AND ELECTRICITY, 7.

RAILROADS.

See *Goodenough v. N. Y., Westchester & Boston Ry. Co.* (Mem.), 699.

Bill of lading — *ejusdem generis* — provision that goods received from private or other sidings shall be at owner's risk until "cars are attached to and after they are detached from trains" — construction and meaning of term "private or other sidings."

See CARRIERS, 1.

Common-law rule that charges of carrier shall be reasonable — effect of provisions of statute (Public Service Commissions Law, Cons. Laws, ch. 48) relating to charges of common carriers — effect of ruling of commission that charges were excessive and that shipper was entitled to recover them — such charges cannot be recovered in common-law action on ruling of commission if paid without objection or protest.

See CARRIERS, 2-5.

Railroad crossing accident — question of contributory negligence ordinarily one for jury — degree of care required of traveler approaching railroad crossing — erroneous dismissal of complaint.

See NEGLIGENCE, 3, 4.

Street railways — horses attached to truck, transporting pile driver through street, killed by electricity passing from trolley wires through truck — whether railroad company was negligent in failing to raise wires to prevent accident question for the jury — contributory negligence of persons driving truck question for the jury.

See NEGLIGENCE, 14.

REAL PROPERTY.

Deed — *Restrictive covenants* — *When restrictions in deed as to kind of houses and use thereof to be erected upon land conveyed to grantee run with the land and bind subsequent purchasers thereof* — *When a breach of such restrictions may be restrained by injunction.* The owner of a block on a street in New York city sold lots therefrom during a period of thirteen years, the owner after the last sale retaining nothing for himself. Uniform restrictions were part of the plan and were imposed by the grantor upon each lot by the following provision: "This conveyance is made * * * on the agreement that he, the said party of the second part, his heirs and assigns, shall, within two years from the date hereof, cause to be erected and fully completed upon said lot, a first-class building, adapted for and which shall be used only as a private residence for one family, and which shall conform to the plans made or being made" by an architect therein named "for the whole front between 72nd and 73rd Streets, on Riverside Drive, and said conveyance is made and said lot is sold upon that condition." The grantee of the lot in question built thereon and used the building as a private dwelling. The present occupant, a tenant of the successor in interest, is using it as a maternity hospital. *Held,*

REAL PROPERTY — Continued.

First, there is a negative duty imposed by the covenant to refrain from the prohibited use. That duty runs with the land, and charges all who take with knowledge of its terms. This is more than a limitation upon construction. It is a restriction of enjoyment. *Second*, a covenant of this kind is sometimes for the benefit of the grantor personally, and sometimes for the benefit of successive lot owners. Whether it is of the one class or of the other is a question of intention, which is to be gathered, not merely from the language of the deed, but from all the surrounding circumstances. Enough is shown here to justify the conclusion as an inference of fact that the scheme embraced the tract, and that all who might thereafter buy were within the range of the intended benefit. *Third*, the attempted use is a breach of the restriction which may be restrained by injunction in an action brought by owners of neighboring dwellings. *Booth v. Knipe*. 390

See Badgley v. Central Consumers Wine & Liquor Co. (Mem.), 693; *Dollard v. Howell (Mem.)*, 706.

Descent of real property of decedent.

See CONTRACT, 10.

Person other than lessee in possession of leasehold premises — presumption and evidence that such person is in possession as assignee — when estopped from denying assignment — annulment of lease by warrant removing tenant — when effect thereof abrogated by agreement of parties.

See LANDLORD AND TENANT, 1, 2.

Sidewalks — liability of property owner for failure to keep sidewalk in repair as required by charter of city — party injured by defective sidewalk may bring suit directly against negligent owner.

See NEGLIGENCE, 9.

REAL PROPERTY LAW.

Express trust conveying real property to trustee to pay income thereof to grantor with directions to convey to grantor's heirs upon his death — when such trust does not transform the reversion to grantor's heirs into a remainder.

See TRUST, 1.

RELIGIOUS CORPORATIONS.

See First Congregational Church v. Faust (Mem.), 686.

REPLEVIN.

Contract — When action will lie to recover from owner possession of chartered scow. A provision in a contract for the charter of a scow that "We (meaning the owner) will furnish a captain for each scow at our own expense, who will be under your control and orders but you are not to be responsible for the acts of any captain in the care, movement or navigation of said scows, and we will save you harmless, and defend you from any claims, actions or suits arising therefrom," does not defeat the effect of the instrument as a demise. Hence, where the scow had been delivered to the owner for repairs and she refused to return it, replevin will lie to recover possession. *Brooklyn Ash Removal Co. v. Connell*. 503

See Wheeler v. Wheeler (Mem.), 622.

RESCISSIION.

See Park & Tilford v. Realty Advertising & Supply Co. (Mem.), 680.

RESCISSION — Continued.

Action for rescission of subscription to stock and for rescission of contract of employment — when action for rescission of subscription to stock may be maintained on ground of fraud — action for rescission of contract cannot be maintained when plaintiff has other and adequate remedy.

See STOCKS AND STOCKHOLDERS, 3, 4.

SALE.

See *Speiegel v. Lowenstein* (Mem.), 654; *Vogelstein v. Pope Metals Co.* (Mem.), 724.

Election of remedies — principal and agent — sale of goods to an agent of an undisclosed principal — attempt to recover value of goods from agent after seller has knowledge of all the facts of the agency.

See ELECTION.

SALE IN BULK.

See *Apex Leasing Co. v. Litke* (Mem.), 625.

SAVINGS BANKS.

Action to recover deposits paid to third party wrongfully in possession of depositor's bank book — care and diligence required of bank to ascertain that person receiving money is entitled thereto — burden of proof upon bank.

See BANKS AND BANKING, 1-3.

SCHOOLS.

1. *Dissolution and consolidation of school districts — Powers of district superintendent in such matters.* Under the statute (Education Law, Cons. Laws, ch. 16, § 129) a district superintendent may, without the consent of the districts, dissolve one or more school districts and may unite the territory thereof to any adjoining district, except a union free school district whose boundaries are coterminous with the boundaries of an incorporated village or city. A distinction is made in the Education Law between the alteration of the boundaries of a school district and the dissolution, reformation and consolidation of districts (§§ 123-129). *Bullock v. Cooley.* 566

2. *Provision of statute permitting appeal to state commissioner of education constitutional — Decision not open to review by court.* Section 890 (formerly 880) of the Education Law, permitting appeals to the state commissioner of education and making his decision on such appeals final and conclusive, is constitutional and valid. The purpose of this statute is to put all controversies over school matters in his charge and to remove them, as far as practicable, from the courts, and hence, a decision of the state commissioner of education on an appeal from an order of consolidation is not open to review in the courts. *Id.*

3. *School districts considered adjoining though separated by body of water.* Where two school districts in the town of Oyster Bay were dissolved and united with another district, the fact that one of those districts is an island separated from the mainland and the district with which it is united, by the waters of Oyster bay, from half a mile to about a mile wide, which is a part of Long Island sound, does not prevent the consolidation. School districts may be considered as adjoining for school purposes even when divided by creeks or other natural boundaries. *Id.*

SCHOOLS — *Continued.*

4. *When determination of district superintendent will not be set aside.*
Where the determination of the district superintendent, in such case, was made after examination of all the facts and circumstances, it cannot be held to be arbitrary or without a basis of jurisdiction upon the law and the facts and the court will not set aside his determination at the instance of a subordinate school officer who has first subjected himself by appeal to the jurisdiction and authority of the commissioner of education and only sought relief from the courts after his failure to succeed in the proceeding specially designed to settle controversies in school matters. *Id.*

SEDUCTION.

Evidence — indictment for seduction under promise of marriage — corroboration required to support testimony of complainant — judgment of conviction reversed on ground that corroborating evidence is insufficient.

See CRIMES, 8, 9.

SERVICES.

See *Seaman v. City of New York* (Mem.), 648.

When real estate broker who has negotiated a sale entitled to his commissions — construction of contract providing that broker should receive his commissions on installments as paid by purchaser — extensions of time to complete contract of sale — broker's claim for commissions on unpaid installment — question whether delay was caused by seller or purchaser for jury.

See COMMISSIONS.

Construction and effect of letters constituting agreement for services.

See CONTRACT, 12.

SESSION LAWS.

1879, *Ch. 53* — Auburn city charter — maintaining and repairing sidewalks.

See NEGLIGENCE, 9.

1897, *Ch. 172* — Auburn city charter — maintaining and repairing sidewalks.

See NEGLIGENCE, 9.

1901, *Ch. 57* — Consolidation of libraries in New York city.

See TRUSTS, 2.

1901, *Ch. 466* — New York city charter — limitation of speed of fire apparatus.

See NEGLIGENCE, 1.

1907, *Ch. 227* — Statutes fixing price of gas.

See GAS AND ELECTRICITY, 1.

1909, *Ch. 18* — Decedent Estate Law — distribution of personal property of decedent.

See CONTRACT, 10.

1909, *Ch. 19* — Domestic Relations Law — judgment confessed in favor of wife to induce her to procure a divorce illegal.

See JUDGMENT.

SESSION LAWS — *Continued.*

1909, *Ch. 21* — Education Law — dissolution and consolidation of school districts.

See SCHOOLS, 1-4.

1909, *Ch. 22* — Election Law — purpose and scope of section 381.

See ELECTIONS, 1-4.

Idem. — Examination of ballots under section 374.

See ELECTIONS, 6.

1909, *Ch. 27* — General Construction Law.

See LIENS, 1.

1909, *Ch. 30* — Highway Law — incorporated village may limit speed of automobile.

See VILLAGES.

1909, *Ch. 33* — Insurance Law — standard provisions for accident insurance policies.

See INSURANCE, 1-6.

1909, *Ch. 36* — Labor Law — provision forbidding employment of children under age of fourteen years.

See CRIMES, 1-4.

Idem. — Labor Law — protection of openings to vats and pans.

See NEGLIGENCE, 10.

Idem. — Labor Law — application of provision requiring machinery to be guarded.

See NEGLIGENCE, 13.

1909, *Ch. 38* — Lien Law — electric fixtures a permanent improvement of real property.

See LIENS, 1.

Idem. — Lien Law — foreclosure of mechanic's lien.

See LIENS, 2-7.

Idem. — Lien Law — requirement that assignment of state contract must be filed with head of department having charge of construction.

See LIENS, 8.

1909, *Ch. 45* — Personal Property Law — implied warranty as to wholesomeness of food.

See FOOD, 1, 2.

1909, *Ch. 49* — Public Health Law — sale of narcotic drugs.

See PARENT AND CHILD, 2.

1909, *Ch. 52* — Real Property Law — descent of real property of decedent.

See CONTRACT, 10.

Idem. — Real Property Law — express trust of real property — reversion.

See TRUST, 1.

SESSION LAWS — *Continued.*

1909, *Ch.* 61 — Stock Corporation Law — liability of stockholders for debts of corporation.

See STOCKS AND STOCKHOLDERS, 1, 2.

1909, *Ch.* 62 — Tax Law — transfer tax a lien upon appraised value of each interest bequeathed or devised.

See TAX, 1, 2.

1909, *Ch.* 64 — Village Law — enforcement of ordinances.

See VILLAGES.

1910, *Ch.* 374 — Highway Law — provision requiring operator of automobile who injures person or property of another to give name to injured person or to police officer.

See CRIMES, 10.

1910, *Ch.* 480 — Public Service Commissions Law — requirements relating to charges of common carriers.

See CARRIERS, 3.

Idem. — Public Service Commissions Law — power to regulate price of gas.

See GAS AND ELECTRICITY, 4.

Idem. — Public Service Commissions Law — power of commission to regulate price of natural gas.

See GAS AND ELECTRICITY, 7.

1913, *Ch.* 155 — Insurance Law — provision that falsity of statement in application shall not bar recovery applies only to policies issued after January 1, 1914.

See INSURANCE, 10.

1917, *Ch.* 200 — Appeal to Court of Appeals.

See APPEAL, 1.

SHIPS AND SHIPPING.

When action of replevin will lie to recover from owner possession of chartered scow.

See REPLEVIN.

SPECIFIC PERFORMANCE.

See *Smith v. Osterhout* (Mem.), 634; *Bischofsky v. Wohl* (Mem.), 645; *Mohawk Improvement Co. v. Everest* (Mem.), 703.

Husband and wife — execution of will by each giving all property to the other under an agreement that survivor should by will distribute the property among the next of kin of both — when the wife, who survived her husband, failed to comply with the agreement, the next of kin of her husband can maintain an action for the specific performance of the contract.

See CONTRACT, 10.

STATE.

Contract for furnishing and equipping locker rooms in state capitol — assignment of such contract to bank as security for loan — state architect proper officer with whom to file assignment — trustees of

STATE — Continued.

public buildings must consent to such assignment — if such consent be not obtained before assignment is filed, the assignment cannot be enforced as against a subsequent mechanic's lien against contractor.

See LIENS, 8.

STOCKBROKERS.

False promise made with intent to break same — action by members of law firm to recover money embezzled by their junior partner and lost in stock speculations, on margins, in a branch office of defendants conducted and managed by their agent — when defendants not bound by false statements and by acts of their agent in concealing speculations of the junior partner — when evidence insufficient to show authority of defendants' agent in acts complained of or that acts were ratified by defendants — proximate cause — deceit followed by negligence not the immediate cause of loss.

See PRINCIPAL AND AGENT, 3-5.

STOCK CORPORATION LAW.

Liability of holder of capital stock, not fully paid, for debts of corporation — liability of such stockholder for royalties for use of patent, which accrued after his purchase of stock.

See STOCKS AND STOCKHOLDERS, 1, 2.

STOCKS AND STOCKHOLDERS.

1. *Liability of holder of capital stock, not fully paid, for debts of corporation.* Under the statute (Stock Corporation Law, § 56; Cons. Laws, ch. 59) providing that "Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him," a sum payable upon a contingency is not a debt "contracted" and does not become a debt, for which the stockholder is liable under the statute, until the contingency has happened. *Bottlers Seal Co. v. Rainey.* 369

2. *Liability of stockholder for royalties for use of patent, which accrued after his purchase of stock.* Where an agreement granted the sole right and license to manufacture, use and sell certain patented articles for a fixed period in consideration of a fixed license fee or royalty to be paid upon each article sold and delivered by the grantee or his assigns, such royalties not to be less in the aggregate than a specified amount, such an agreement is contingent and creates no debt until the time stipulated for payment arrives; the contract is for a future indebtedness to be incurred and paid, in amounts designated by the contract when the consideration is furnished; hence, when the licensee named in that contract transferred his rights thereunder to a corporation which agreed to carry out the terms but which failed to pay the amounts which became due for royalties as articles were sold and delivered, the licensor can maintain an action under the statute against a holder of stock not fully paid, in such assignee corporation, for his liability for such debt of the corporation so contracted while such stock was held by him. A contention of defendant that the debt was contracted when the assignment was made and before he became a stockholder cannot be sustained. *Id.*

3. *Subscription for stock induced by false representations — Action for rescission may be maintained.* This action was brought by the plaintiff seeking rescission of a subscription made by him for capital stock of the defendant corporation and to have repaid to him the

STOCKS AND STOCKHOLDERS — Continued.

sum paid on such subscription; also to have rescinded a contract of employment made by him with the corporation with an accounting for damages claimed to have been sustained by him under the contract. This relief is sought upon the ground that the plaintiff was induced to make the subscription and contract by the fraudulent representations of the individual defendant acting in behalf of the corporation. *Held*, on examination of the complaint on demurrer, that while the representations of the individual defendant through which plaintiff was induced to subscribe for stock and enter into the contract of employment related to something which was to occur in the future in the way of organization of the corporation and payment for its stock in full with property and cash, the allegations describe a case where a defendant has fraudulently and positively as with personal knowledge stated that something was to be done when he knew it was not to be done and that his representations were false. Such statements and representations when false are actionable. *Ritzwoller v. Lurie.* 464

4. *Action for rescission of contract of employment — When plaintiff not entitled to equitable relief.* Upon the allegations of the complaint as to the contract for employment and demand for its rescission, even if they are sufficient to state a cause of action, it is doubtful whether plaintiff is entitled to equitable relief, nor does he need such relief to protect whatever rights he has. *Id.*

5. *When individual who made false representations on behalf of corporation is not answerable personally.* A demurrer is well interposed by the individual defendant. In making the alleged false representations he acted on behalf of the corporation and the money paid by plaintiff to him was so paid for the purpose of being turned over to the corporation for stock and was in fact so turned over. No cause of action is alleged against him personally. *Id.*

See Sanders v. Proctor (Mem.), 682; Richards v. Robin (Mem.), 719.

Stock pledged to secure payment therefor — when dividends declared on stock are cash and should be applied on the indebtedness — sale of pledged stock with accumulated dividends thereon unlawful — rights and remedies of pledgor.

See PLEDGE, 1, 2.

STREETS.

See Greis v. City of Syracuse (Mem.), 658.

Sidewalks — liability of property owner for failure to keep sidewalk in repair as required by charter of city — party injured by defective sidewalk may bring suit directly against negligent owner.

See NEGLIGENCE, 9.

Injury from defective street — sufficiency of notice.

See NEGLIGENCE, 12.

Horses attached to truck, transporting pile driver through street, killed by electricity passing from trolley wires through truck — whether railroad company was negligent in failing to raise wires to prevent accident question for the jury — contributory negligence of persons driving truck question for the jury.

See NEGLIGENCE, 14.

SUBSCRIPTIONS.

See Wing v. Smith (Mem.), 657.

Stock subscriptions — construction of agreement proposed to be entered into by a syndicate composed of subscribers of bonds to be issued to build a proposed railroad and the railroad promoters as managers of the proposed syndicate — when such agreement signed by only one subscriber for bonds does not authorize promoters to borrow money on strength of such subscription — when subscriber who is not liable for such loan may have agreement and subscription canceled.

See CONTRACT, 11.

Action for rescission of subscription to stock and for rescission of contract of employment — when action for rescission of subscription to stock may be maintained on ground of fraud — action for rescission of contract cannot be maintained when plaintiff has other and adequate remedy.

See STOCKS AND STOCKHOLDERS, 3, 4.

SURETY BONDS.

See Riveria Realty Co. v. Illinois Surety Co. (Mem.), 688.

TAX.

1. *Transfer tax is a lien upon appraised value of each interest bequeathed, not upon gross amount of several bequests to any one individual.* Under section 224 of the Tax Law (Cons. Laws, ch. 60) the basis of the transfer tax is not upon the gross amount of several bequests to one individual, but rather upon the appraised value of the separate interests into which the estate is divided, and the lien imposed is limited to such separate interest. *Smith v. Browning.*
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2. *Devisee of real property who has failed to obtain transfer tax appraisal or to obtain consent and release of property pending appraisal, cannot compel specific performance of contract to purchase same.* Plaintiff and defendant entered into a contract for a sale and purchase of real estate, the plaintiff to convey and defendant to acquire said premises free and clear of all liens or charges except an outstanding mortgage thereon. On the due day defendant refused to accept the deed of said premises tendered by the plaintiff upon the sole ground that plaintiff's title was unmarketable by reason of the fact that the transfer tax upon plaintiff's interest in her deceased husband's estate had not then been computed and paid and that said tax was an existing lien thereon. Plaintiff thereafter brought this action to compel a specific performance of the contract. *Held*, that the transfer tax was not a lien on the specific property contracted for, but that owing to the delay of plaintiff in obtaining an appraisal of the estate and in view of the fact that she did not avail herself of the practice of obtaining a consent and release of the property in question pending the appraisal, the defendant had no means of ascertaining how much or how little tax was chargeable on the premises. He was entitled to receive a marketable title free from any transfer tax and was not required under the terms of his contract with plaintiff to speculate with reference thereto. In the exercise of reasonable care plaintiff could have given a marketable title to the premises on the due day. Her failure in that respect cannot be attributed to defendant; hence she cannot enforce specific performance against him. *Id.*

See City of Syracuse v. Onondaga Co. Sav. Bank (Mem.), 650;
Adamson v. Schreiner (Mem.), 713.

TAX LAW.

Transfer tax a lien upon appraised value of each interest bequeathed or devised.

See TAX, 1, 2.

TAXPAYER'S ACTION.

See *Andrews v. Pierson* (Mem.), 649.

TITLE.

See *Brownfield v. Simon* (Mem.), 643; *Reed v. Reed* (Mem.), 695.

TITLE GUARANTY.

When vendee who at time of execution of contract of sale knew of defect in title cannot recover against drawer of contract and of subsequent deed for failure to protect him — policy of insurance may define "loss" intended to be covered — when owner of real property may insure himself against defects in title of which he had knowledge — when dismissal of counterclaim pleading facts which would entitle insurer to reformation of policy is error.

See NEGLIGENCE, 5-8.

TRANSFER TAX.

See *Matter of Richards* (Mem.), 671.

Transfer tax is a lien upon appraised value of each interest bequeathed, not upon gross amount of several bequests to any one individual — devise of real estate not subject to lien for transfer tax upon bequests of personal property to devisee.

See TAX, 1, 2.

TRIAL.

Burden of proof — when province of jury to draw conclusion from testimony of experts — whether clerks in bank exercised care and were reasonably prudent question for jury.

See BANKS AND BANKING, 1-3.

Erroneous denial of motion to strike out evidence — erroneous admission of expert evidence.

See CONTRACT, 1-3.

Requests to charge — erroneous refusal.

See CONTRACT, 4.

Erroneous reason for receiving competent and admissible evidence not sufficient ground for reversal of judgment — when statements made by witness admissible as explanatory of the conduct and acts of the witness.

See CRIMES, 6, 7.

Seduction — evidence — indictment for seduction under promise of marriage — corroboration required to support testimony of complainant — judgment of conviction reversed on ground that corroborating evidence is insufficient — erroneous refusal to charge.

See CRIMES, 8, 9.

When declaration of injured party admissible as part of the *res gestæ*.

See CRIMES, 10.

TRIAL — *Continued.*

When error to exclude evidence tending to show breach of warranty.

See EVIDENCE, 1.

Rule as to weight and quality of evidence offered in support of claim against decedent's estate — when section 829 of Code of Civil Procedure not applicable — inadequacy of evidence to sustain claim of oral assignment of insurance policy.

See EVIDENCE, 2-5.

Distinction between insufficient evidence and unsatisfactory evidence — when evidence of negligence sufficient to make a case for jury — elements of damage not alleged in complaint may not be considered.

See EVIDENCE, 6-8.

When inaccurate charge harmless.

See FOOD, 2.

Presumption of death arising from continuous absence of seven years — general rule and application thereof — evidence required to establish such presumption — when question one of law — inadequacy of evidence.

See INSURANCE, 7-9.

When corporation may maintain action for libel without proof of special damage — if words complained of are ambiguous, their meaning and application are questions for jury — when entire publication may be shown.

See LIBEL, 1-4.

Railroad crossing accident — question of contributory negligence ordinarily one for jury — degree of care required of traveler approaching railroad crossing — erroneous dismissal of complaint.

See NEGLIGENCE, 3, 4.

Master and servant — place to work — dangerous situation — questions of negligence for jury — erroneous dismissal of complaint.

See NEGLIGENCE, 11.

Exceptions to charge and to refusals to charge.

See PARENT AND CHILD, 3.

Statement of foreign law set forth as a defense in an action — when question of fact which may be admitted by demurrer — when statement of statutes and decision of foreign state presents question of law for the court.

See PLEADING, 5-8.

When question of rights and obligations of parties should be submitted to jury — improper instruction to add interest to award of damages.

See WATER AND WATERCOURSES, 2, 3.

TRUST.

1. *Express trust conveying real property to trustee to pay income thereof to grantor with directions to convey to grantor's heirs upon his death — When such trust does not transform the reversion to grantor's heirs into a remainder.* Where there was no adequate disclosure of a purpose in the mind of a grantor, who created a trust, to vest his

TRUST — *Continued.*

presumptive heirs with rights which it would be beyond his power to defeat, and the grant by its terms was subject to destruction at the will of the trustee, it was also subject to destruction, as against the heirs at law, at the will of the grantor. They had an expectancy but no estate. Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to the person creating the trust or his heirs (Real Property Law, § 102), and where the owner of real property conveyed it to a trustee to pay to grantor a certain sum from the rents and profits and also some debts and mortgages on the property, the trustee to have power to mortgage for the payment of liens and also to sell or reconvey to the grantor, and upon the death of the grantor the property, if not sold, to be conveyed to his heirs at law, or, if sold, the remainder of the proceeds of sale to be paid to them, such trust did not create a life estate in the trustee with remainder over to the heirs of grantor. His heirs at law, if they receive anything on his death, will take by descent and not by purchase, and hence there is nothing that creditors of such heirs can seize. *Doctor v. Hughes.* 305

2. *Gift of remainder of residuary estate to a library — Consolidation of such library with a municipal public library and surrender of its charter before termination of the trust estate — Legacy to library did not vest on death of testator and library having ceased to exist before life estate terminated, the legacy lapsed and became property as to which testator died intestate and passed to his heirs and next of kin.* The will of testator provided that one-third of his residuary estate should be held in trust during the life of a named beneficiary. After her death and after payment of certain specific bequests he directed that a certain sum be paid from this portion of his residuary estate to the Washington Heights Library in the city of New York upon condition that it should be maintained at all times as a free circulating library. The rest of the one-third so bequeathed he directed to be given an institution of which the defendant, the Knickerbocker Hospital, is the successor. An act was passed (L. 1901, ch. 57) whereby it was in substance provided that any corporation carrying on a library in the city of New York might convey and transfer all of its property to the New York Public Library on such terms, conditions and limitations as might be agreed upon between the two parties; also that the regents might "accept a surrender of the charter of the library corporation so conveying its property, and forever discharge its directors or trustees from their trusts in the premises," also that "any devise or bequest contained in any last will and testament made to any corporation conveying its property under the authority of this act, whether made before or after such conveyance, shall not fail by reason of such conveyance, but the same shall enure to the benefit of" the New York Public Library. After the passage of this act and before the expiration of the foregoing life trust, the Washington Heights Library took proper steps to transfer its property to the New York Public Library and surrender its charter, and subsequently the board of regents in accordance with the provisions of the statute accepted a surrender of the charter of the former library corporation. The sum bequeathed to the Washington Heights Library is claimed by the New York Public Library under the residuary clause. *Held*, that the bequest in favor of the Washington Heights Library did not vest on the death of the testator; and that before that corporation became entitled to its legacy under the will it had absolutely ceased to exist and the legacy, therefore, lapsed and did not pass to the New York Public Library as its successor under the foregoing proceedings. *Wright v. Wright.* 329

TRUST — Continued.

3. *Where there is a lapse of an intended legacy of part of the residuum the part as to which disposition has failed will go as in case of intestacy.* While as a general rule a residuary clause will include and be applicable to lapsed legacies, it is not the rule in respect of a residuary clause where the legacy which has failed and lapsed was itself part of a residue. In such case, on failure of the intended legacy of part of the residuum, the part as to which disposition has failed will go as in case of intestacy, and the residuum passing under the residuary clause will not be augmented by a "residue of a residue." Hence, the lapsed legacy does not fall into the residuum of the third residuary portion and does not pass under the residuary clause applicable to that portion to the appellant Knickerbocker Hospital, but becomes property as to which the testator died intestate and passes to his heirs and next of kin. *Id.*

Court of equity bound by no unyielding formula — equity of transaction must shape relief — when employer may hold employee as trustee and require him to account for profits of personal transaction — when oral consent of employer to such transaction precludes him from impressing such a trust and acquits employee of breach of written contract forbidding his engaging in business similar to his employer's.

See CONTRACT, 7-9.

UNFAIR COMPETITION.

See *Comerma Co. v. Comerma* (Mem.), 676.

VENDOR AND PURCHASER.

See *Trowbridge v. Earle* (Mem.), 671; *Goldinger v. Baumann* (Mem.), 697.

VILLAGES.

Misdemeanor — Motor vehicles — Incorporated villages may by ordinance limit the speed of automobiles and provide that violation of ordinance is a misdemeanor punishable by a fine and imprisonment if fine is not paid — Action for false arrest of person violating such an ordinance cannot be maintained. The state, when it punishes misdemeanors by fine, is not confined to the remedy of a civil action for a penalty. (Code Civ. Pro. § 1962.) The offender who refuses to pay may be imprisoned until the fine is satisfied, subject to the condition that the imprisonment may not exceed one day for every dollar of the fine. (Code Crim. Pro. §§ 484, 718.) Under the Highway Law (Cons. Laws, ch. 25, §§ 287, 288, 290) an incorporated village may by ordinance limit the speed of automobiles in the village to fifteen miles an hour and provide that a violation of the ordinance is a misdemeanor punishable by a fine not exceeding that prescribed by subdivision 2 of section 290, and if the fine be not paid the offender may be imprisoned. Hence a person arrested for violation of such ordinance cannot maintain an action for false arrest against the officer who arrested him upon the ground that the village authorities have no power to enforce the ordinance except under the Village Law (Cons. Laws, ch. 64, § 93), and, therefore, have power only to prescribe a penalty for a violation of the ordinance. *Chapman v. Selover.* 417

When attorney employed by village at annual salary an employee of the village and not a public officer thereof — when entitled to compensation although all officers of village discharged when it became incorporated as a city.

See CONTRACT, 5.

VILLAGE LAW.

Power to enforce village ordinance.

See VILLAGES.

WAIVER.

Right to recover excess charges by carrier may be waived.

See CARRIERS, 2.

WARRANTY.

Execution of written contract purporting to be same as oral contract previously agreed upon by parties but guaranty of which was omitted in written contract — party induced to sign such contract by false statements of contents thereof by other party — action for breach of warranty of oral contract — when such action can be maintained and damages recovered.

See CONTRACT, 6.

When error to exclude evidence tending to show breach of warranty.

See EVIDENCE, 1.

Implied warranty as to wholesomeness of food — action may be maintained for breach — when implied warranty exists.

See FOOD, 1, 2.

WATER AND WATERCOURSES.

1. *Navigation — Injury to boat and cargo through failure of contractor to mark shoal in newly-excavated part of Erie canal.* In an action against a contractor, engaged in enlarging the Erie canal, for alleged negligence in failing to mark a shoal spot in the newly-excavated part of the canal about thirty to fifty-five feet from the original channel but apparently safely navigable, whereby plaintiff's boat ran aground and with its cargo was damaged, *held*, that although it appears that the defendant was required by his contract with the state to take such precautionary measures as might be necessary to guard against interruption to navigation, it was erroneous for the court in its charge and by refusals to charge to hold as matter of law that the plaintiff's boat was rightfully and without negligence where it was and that defendant as matter of law was guilty of negligence because in the course of and while still engaged in making excavations it allowed this uprising strip of bottom to exist. *Ryan v. Empire Engineering Corpn.* 62

2. *Question of rights and obligations of parties should have been submitted to jury.* The trial court instead of defining the rights and obligations of the parties by rigid rules of law should have submitted them to the jury with instructions as to the tests of reasonable conduct and ordinary prudence. *Id.*

3. *Improper instruction that jury must add interest to award of damages.* It was improper to instruct the jury that they must add interest to the amount, if any, which they should award as damages for the injury to plaintiff's boat. *Id.*

WILL.

Agreement by husband and wife to execute wills giving all their property to each other — specific performance.

See CONTRACT, 10.

WILL — Continued.

Testamentary trust — gift of remainder of residuary estate to a library — consolidation of such library with a municipal public library and surrender of its charter before termination of the trust estate — legacy to library did not vest on death of testator and library having ceased to exist before life estate terminated, the legacy lapsed and became property as to which testator died intestate and passed to his heirs and next of kin.

See TRUST, 2, 3.

WORKMEN'S COMPENSATION.

1. *Claimant injured while visiting another workman across the room from place where claimant was employed — Accident did not arise out of or in course of claimant's employment.* An award under the Workmen's Compensation Law can be sustained only where the court is able fairly to say that between the work for which the employee was engaged and the disputed act which led to the accident there was either naturally or as the result of some act of the employer or of custom a real relationship which brought the accident within the range of employment, and, therefore, it could be said to have arisen out of and in the course of the employment. The claimant was in the employ of defendant which was engaged in the manufacture of shoes, and his duties consisted in marking soles with a rubber hand stamp. At the time of the accident claimant had crossed the room in which he was working to say good-bye to a fellow-employee who had been drafted and who would be required to leave work on account of the draft, and while leaning on the bench connected with the splitting machine which was being operated by his fellow-employee, his right arm was caught in an unguarded cog-wheel, and he sustained the injuries for which the award has been made. At the time that claimant walked across the room to greet his fellow-employee, he had finished the work that had been assigned to him and was waiting the arrival of more work. *Held*, that the accident did not in any degree arise out of or in the course of claimant's employment. *Matter of De Salvio v. Menihan Co.* 123

2. *Claimant injured while walking upon tracks in railroad yard instead of adjacent and convenient highway — When accident did not arise out of and within course of employment.* The deceased for whose death compensation is claimed was in the employ of defendant as a car inspector in one of its yards; he was accustomed to go for his dinner to his home, which was not on the defendant's premises, on week days taking the highway and on Sundays walking on the defendant's right of way in order to avoid exposing himself in his working clothes to the view of people on the highway; he took this route without objection on the part of his employer and in so doing violated no enforced rule; on Sundays he received pay for eleven hours which included the one which he was permitted to take for dinner; on the Sunday in question as he was thus going to dinner he received injuries causing death by falling from a trestle which was within the limits of the railroad yards in which yards he performed certain of his duties. The deceased on the occasion in question traveled more than half a mile from the yard where he stopped work before reaching the trestle where he fell, whereas it was a much shorter distance to the highway which he ordinarily used for this trip, and the route which he did take on this occasion before reaching the trestle crossed two streets which would have led him home. *Held*, that the findings of the specific circumstances which gave rise to the accident are to control rather than the general conclusion drawn from them by the commission, and that tested by the general character of the undertaking in which the

WORKMEN'S COMPENSATION — *Continued.*

deceased was engaged at the time of the accident the latter did not arise in the course of or spring out of his employment. *Matter of McInerney v. B. & S. R. R. Corp.* 130

See Matter of Dugan v. McArdle (Mem.), 668; *Matter of Haley v. B. & A. R. R.* (Mem.), 669.

WORKMEN'S COMPENSATION LAW.

Claimant injured while visiting another workman across the room from place where claimant was employed — accident did not arise out of or in course of employment.

See WORKMEN'S COMPENSATION, 1.

Claimant injured while walking upon tracks in railroad yard instead of adjacent and convenient highway — when accident did not arise out of and within course of employment.

See WORKMEN'S COMPENSATION, 2.

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WATERS AND WATERCOURSES.

Navigation; Injury to boat and cargo through failure of contractor to mark shoal in newly-excavated part of Erie canal; Erroneous charge as to defendant's negligence and plaintiff's freedom from contributory negligence; Improper instruction that jury must add interest to award of damages.

Ryan v. Empire Engineering Corp., 62, 65.

APPEAL.

Construction of Constitution must be directly involved to warrant appeal for that reason, without permission to Court of Appeals, under section 190 of Code of Civil Procedure.

Matter of Haydorn v. Carroll, 84, 86.

WORKMEN'S COMPENSATION LAW.

Claimant injured while visiting another workman across the room from place where claimant was employed; Accident did not arise out of or in course of claimant's employment.

Matter of Di Salvio v. Menihan Co., 123, 125.

Claimant injured while walking upon tracks in railroad yard instead of adjacent and convenient highway; When accident did not arise out of and within course of his employment.

Matter of McInerney v. B. & S. R. R. Corp., 130, 132.

EVIDENCE.

Insurance (life); Claim that insurance policy was assigned by husband to his wife by oral assignment; Testimony of person claiming insurance under such alleged assignment not barred under the statute (Code Civ. Pro. § 829); When evidence to sustain claim under oral assignment not sufficient to show that claimant is entitled to insurance as against beneficiaries named in policy.

Ward v. N. Y. Life Ins. Co., 314, 316.

TESTAMENTARY TRUST.

Gift of remainder of residuary estate to a library; Consolidation of such library with a municipal public library and surrender of its charter before termination of the trust estate; Legacy to library did not vest on death of testator and library having ceased to exist before life estate terminated, the legacy lapsed and became property as to which testator died intestate and passed to his heirs and next of kin.

Wright v. Wright, 329, 331.

STOCK CORPORATIONS.

Stock subscriptions; Action for rescission of subscription to stock and for rescission of contract of employment; When action for rescission of subscription to stock may be maintained on ground of fraud; Action for rescission of contract cannot be maintained when plaintiff has other and adequate remedy.

Ritzwoller v. Lurie, 464, 466.

PLEDGOR AND PLEDGEE.

Conversion; Stock pledged to secure payment therefor; When dividends declared on stock are cash and should be applied on the indebtedness; Sale of pledged stock with accumulated dividends thereon unlawful; Rights and remedies of pledgor.

Brightson v. Claflin, 469, 472.

PRINCIPAL AND AGENT.

When agent of surety company who received moneys for company not liable for such moneys which the company refused to pay after the agency had terminated.

Sagone v. Mackey, 594, 596.

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MECHANIC'S LIEN.

Landlord and tenant; Validity of lien filed against property of landlord for materials furnished and work done in improvements to property made by tenant; When designation of corporate owner of property by original name instead of new corporate name not a misnomer; Liens filed against stockholder and director of corporation cannot be enforced as liens

against the corporation; Laborers cannot enforce liens for unpaid checks delivered to and held by bona fide holders.

Gates & Co. v. Nat. Fair & Exposition Assn., 142, 147.

LABOR LAW.

Provision that every vat and pan, the opening of which is below level of elbow of workman, shall be protected; Such provision not applicable to a shallow trough set in ground and used for cooling red hot tires in a wagonmaker's shop.

Levberg v. Schumacher, 167, 169.

GAS COMPANIES.

Public service commission; South Glens Falls (village of); Contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years; Increase of such rates by company on the ground that they have become insufficient and confiscatory owing to increased cost of production; Public service commission cannot regulate such rates. (Dis. op.)

People ex rel. Vil. of S. Glens Falls v. P. S. Comm., 216, 229.

PARENT AND CHILD.

Public Health Law; Sale of heroin to infant in violation of statute; When mother dependent upon earnings of minor son can maintain action against druggists who sold heroin to him whereby his health was ruined and his services lost; Compensatory damages, only, can be recovered; Punitive damages not allowed in common-law action by third person.

Tidd v. Skinner, 422, 424.

STREET RAILWAYS.

Negligence; Horses attached to truck transporting pile driver through street, killed by electricity passing from trolley wires through truck; Whether railroad company was negligent in failing to raise wires to prevent accident question of law for the court. (Dis. op.)

Chase Trucking Co. v. Richmond L. & R. R. Co., 435, 441.

CARRIERS.

Effect of provisions of statute (Public Service Commissions Law, Cons. Laws, ch. 48) relating to charges of common carriers; Effect of ruling of commission that

charges were excessive and that shipper was entitled to recover them; Such charges may be recovered in common-law action on ruling of commission. (Dis. op.)

Murphy v. N. Y. C. R. R. Co., 548, 559.

PUBLIC SCHOOLS.

Constitutional law; Dissolution and consolidation of school districts; Powers of district superintendent in such matters under the statute (Education Law, Cons. Laws, ch. 16, § 129); Provision of statute permitting appeals to state commissioner of education constitutional and valid and his decision on appeal from an order of consolidation not open to review in the courts.

Bullock v. Cooley, 566, 569.

PLEADING.

Statement of foreign law set forth as a defense in an action; When question of fact which may be admitted by demurrer; When statement of statutes and decision of foreign state presents question of law for the court.

Hanna v. Lichtenhein, 579, 582.

COLLIN, J.

ELECTIONS.

Purpose and scope of section 381 of Election Law; Ordinary writ of mandamus authorized thereby; When affidavit insufficient to warrant issuance of writ; Court cannot, under section 381 of Election Law, direct production of protested, void or blank ballots; Appellate Division cannot, under section 381, order judicial review of ballots cast; Order of Appellate Division modifying order is appealable of right to Court of Appeals.

Matter of Whitman (No. 1), 1, 3.

DEATH.

Insurance (life); Presumption of death arising from continuous absence of seven years; General rule and application thereof; Evidence required to establish such presumption.

Butler v. Mutual Life Ins. Co., 197, 199.

CRIMES.

Appeal; Order of Appellate Division reversing a judgment of conviction and ordering a new trial "for errors of law only;" Such order cannot be reviewed in Court of Appeals; Order should show that decision was upon weight of evidence.

People v. Redmond, 206, 208.

CONTRACT.

Execution of written contract purporting to be same as oral contract previously agreed upon by parties but guaranty of which was omitted in written contract; Party induced to sign such contract by false statements of contents thereof by other party; Action for breach of warranty of oral contract; When such action can be maintained and damages recovered.

Whipple v. Brown Brothers Co., 237, 239.

CRIMES.

Appeal; Non-unanimous decision of Appellate Division affirming a judgment of conviction; Court of Appeals must examine record to ascertain whether there is evidence tending to support verdict of guilty; Evidence; Erroneous reason for receiving competent and admissible evidence not sufficient ground for reversal of judgment; When statements made by witness admissible as explanatory of the conduct and acts of the witness.

People v. De Simone, 261, 263.

LABOR LAW.

Provision requiring machines used in factories to be guarded; Construction and application of such provision; Employer not liable for injury from unguarded machine if there is no practicable guard obtainable; Evidence examined and held insufficient to sustain verdict against employer.

Michalski v. American M. & F. Co., 294, 295.

HABEAS CORPUS.

Constitutional law; Special proceedings; Writ to inquire into the detention of one imprisoned, or held in custody, for a crime, is a civil, not a criminal, process, a special proceeding to enforce a civil right; Appeal from order dismissing a writ not appealable as involving a constitutional question.

People ex rel. Curtis v. Kidney, 299, 300.

PRACTICE.

Amendments; Judgments; Costs; Clerical errors or omissions in judgments or mistakes in entry thereof may be corrected; Court may not by amendment correct errors in substance affecting a judgment; To withhold or award costs is a substantive part of a judgment in equity.

Herpe v. Herpe, 323, 325.

CARRIERS.

Common-law rule that charges of carrier shall be reasonable; Effect of provisions of statute (Public Service Commissions Law, Cons. Laws, ch. 48) relating to charges of common carriers; Effect of ruling of commission that charges were excessive and that shipper was entitled to recover them; Such charges cannot be recovered in common-law action on ruling of commission if paid without objection or protest.

Murphy v. N. Y. C. R. R. Co., 548, 550.

ATTORNEYS.

Compensation on appeal from judgment of death.

People v. Chapman, 700, 701.

CUDDEBACK, J.

WARRANTY.

When error to exclude evidence tending to show breach of warranty.

Putnam v. Interior Metal Mfg. Co., 37, 38.

LIEN LAW.

Contract for furnishing and equipping locker rooms in State Capitol; Assignment of such contract to bank as security for loan; State architect proper officer with whom to file assignment; Trustees of public buildings must consent to such assignment; If such consent be not obtained before assignment is filed, the assignment cannot be enforced as against a subsequent mechanic's lien against contractor; Appeal; Question of irregularity of plaintiff's lien not having been considered by Appellate Division, such question cannot be reviewed in Court of Appeals.

Gen. Fireproofing Co. v. Keepsdry Const. Co., 180, 183.

CONTRACT.

Village officers; When attorney employed by village at annual salary an employee of the village and not a public officer thereof; When entitled to compensation although all officers of village discharged when it became incorporated as a city.

Fisher v. City of Mechanicville, 210, 213.

INSURANCE (ACCIDENT).

Application of Insurance Law (Cons. Laws, ch. 28, § 107, as amd. by L. 1913, ch. 155, and § 58, as amd. by L. 1906, ch. 326).

Baumann v. Preferred Accident Ins. Co., 480, 483.

REPLEVIN.

Contract; When action will lie to recover from owner possession of chartered scow.

Brooklyn Ash Removal Co. v. Connell, 503, 504.

HOGAN, J.

MUNICIPAL CORPORATIONS.

Auburn (city of); Negligence; Sidewalks; Liability of property owner for failure to keep sidewalk in repair as required by charter of city; Party injured by defective sidewalk may bring suit directly against negligent owner.

Willis v. Parker, 159, 161.

PLEADING.

Assignment of interest in estate; Delivery to executor in escrow; Complaint alleging that executor wrongfully filed such assignment states cause of action; When failure of assignor to raise question upon judicial settlement a bar to the action; Demurrers to such defense and to counterclaims when overruled; Plaintiff permitted to withdraw demurrers.

Hull v. Hull, 342, 346.

TAX LAW.

Transfer tax is a lien upon appraised value of each interest bequeathed, not upon gross amount of several bequests to any one individual; Devise of real estate not subject to lien for transfer tax upon bequest of personal property to devisee.

Smith v. Browning, 358, 360.

MASTER AND SERVANT.

Negligence; Action under Employers' Liability Act; Erroneous reversal by Appellate Division of judgment for plaintiff on ground that defendant was not guilty of negligence as matter of law; Effect of reversal of decision of Appellate Division by Court of Appeals.

Gilhooley v. Burgard, 445, 447.

CARDOZO, J.

LABOR LAW.

Provision prohibiting employment of children under the age of fourteen years; Employer equally liable whether child is employed by himself or his agents; Must employ reasonable supervision to prevent violation of statute; Legislature had power to make violation of statute a criminal offense and provide for punishment by fine.

People ex rel. Price v. Sheffield Farms, etc., Co., 25, 27.

NEGLIGENCE.

New York (city of); When officers and men of fire department not exempt from limitations in respect of speed; Action against fire commissioner for injuries from automobile in which he was being driven by fireman; Commissioner not exonerated as of course.

Dowler v. Johnson, 39, 41.

GAS COMPANIES.

Inadequate and confiscatory rates fixed by statute; Power of courts to regulate rates; Aggrieved party may maintain action in equity to restrain enforcement of confiscatory rates; Sufficiency of pleadings.

Municipal Gas Co. v. Public Service Comm., 89, 94.

CONTRACT.

Damages; Action for breach of contract to furnish first run of "feature" motion picture films; Erroneous admission of evidence to prove damages; Insufficient evidence.

Broadway Photoplay Co. v. World Film Corp., 104, 106.

REAL PROPERTY.

Trusts; Remainders; Reversion; Express trust conveying real property to trustee to pay income thereof to grantor with directions to convey to grantor's heirs upon his death; When such trust does not transform the reversion to grantor's heirs into a remainder.

Doctor v. Hughes, 305, 308.

CONTRACT.

When employer may hold employee as trustee and require him to account for profits of personal transaction; When oral consent of employer to such transaction precludes him from impressing such a trust and acquits employee of breach of written contract forbidding his engaging in business similar to his employer's.

Beatty v. Guggenheim Exploration Co., 380, 383.

REAL PROPERTY.

Deed; Restrictive covenants; When restrictions in deed as to kind of houses and use thereof to be erected upon land conveyed to grantee run with the land and bind subsequent purchasers thereof; When a breach of such restrictions may be restrained by injunction.

Booth v. Knipe, 390, 393.

INTERSTATE COMMERCE.

Natural gas; Public service commission; Although the transportation of natural gas by pipe lines, from another state to this, is interstate commerce, the price at which such gas is sold within the state is subject to regulation by the public service commission in the absence of Federal regulation.

Penn. Gas Co. v. Pub. Serv. Comm., 397, 401.

VILLAGES.

Misdemeanor; Motor vehicles; Incorporated villages may by ordinance limit the speed of automobiles and provide that violation of ordinance is a misdemeanor punishable by a fine and imprisonment if fine is not paid; False arrest; Action for false arrest of person violating such an ordinance cannot be maintained.

Chapman v. Selover, 417, 419.

POUND, J.

LABOR LAW.

Construction and application of provision prohibiting employment of children under the age of fourteen years. (Con. op.)

People ex rel. Price v. Sheffield Farms, etc., Co., 25, 33.

NEGLIGENCE.

Railroad crossing accident; Question of contributory negligence ordinarily one for jury; Degree of care required of traveler approaching railroad crossing; Erroneous dismissal of complaint.

Carr v. Pennsylvania R. R. Co., 44, 45.

MECHANICS' LIENS.

Fixtures; Lien Law; When electric lighting fixtures furnished and used in the equipment of an office building are included in the "permanent improvement of real property" within meaning of the Lien Law.

Wahle-Phillips Co. v. Fitzgerald, 137, 139.

BUILDER'S CONTRACT.

Substantial performance; Quantum meruit; Trial; Requests to charge.

Steel S. & E. C. Co. v. Stock, 173, 175.

STOCK CORPORATIONS.

Liability of holder of capital stock, not fully paid, for debts of corporation; Liability of such stockholder for royalties for use of patent which accrued after his purchase of stock.

Bottlers Seal Co. v. Rainey, 369, 370.

EVIDENCE.

Distinction between insufficient evidence and unsatisfactory evidence; Landlord and tenant; Negligence; When evidence of negligence of landlord sufficient to make a case for the jury; Order of reversal; Finding of negligence disapproved requires new trial (Code Civ. Pro. § 1338).

Queeney v. Willi, 374, 377.

CARRIERS.

Bill of lading; Ejusdem generis; Provisions that goods received from private or other sidings shall be at owner's risk until "cars are attached to and after they are detached from trains;" Construction and meaning of term "private or other sidings."

Bers v. Erie R. R. Co., 543, 545.

PRACTICE.

Special appearance; Demand for copy of the complaint in an action is not an appearance, either general or special; Motion to dismiss complaint for failure to serve denied.

Muslusky v. Lehigh Valley Coal Co., 584, 586.

Unanimous decision of Appellate Division after special verdict; Remedial liability; Principal and agent; Fraud and deceit; False promise made with intent to break same; Action by members of law firm to recover money embezzled by their junior partner and lost in stock speculations, on margins, in a branch office of defendants conducted and managed by their agent; When defendants not bound by false statements and by acts of their agent in concealing speculations of the junior partner; When evidence insufficient to show authority of defendant's agent in acts complained of or that acts were ratified by defendants; Proximate cause; Deceit followed by negligence not the immediate cause of loss.

Deyo v. Hudson, 602, 606.

McLAUGHLIN, J.

ELECTIONS.

Purpose and scope of section 381 of Election Law; Writ of mandamus authorized thereby; When order granted in such proceeding not a final order under section 374 of Election Law; Order of Appellate Division modifying order not appealable of right to Court of Appeals. (Dis. op.)

Matter of Whitman (No. 1), 1, 16.

JUDGMENT.

Public policy; Judgment confessed in favor of defendant to induce her to procure a divorce from plaintiff; Such judgment is against public policy and illegal and cannot be enforced.

Schley v. Andrews, 110, 112.

GAS COMPANIES.

Public service commission; South Glens Falls (village of); Contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years; Increase of such rates by company on the ground

that they have become insufficient and confiscatory owing to increased cost of production; Power of public service commission to regulate such rates. (Con. op.)
People ex rel. Vil. of S. Glens Falls v. P. S. Comm., 216, 225.

CONTRACT.

Execution of written contract purporting to be same as oral contract previously agreed upon by parties but guaranty of which was omitted in written contract; Party induced to sign such contract by false statements of contents thereof by other party; Action for breach of warranty of oral contract cannot be maintained; Plaintiff's remedy action to have the contract reformed. (Dis. op.)

Whipple v. Brown Brothers Co., 237, 255.

NEGLIGENCE.

Streets and sidewalks; New York (city of); Requirement of charter that notice of intention to bring action for injuries, caused by negligence of the city, must be filed with the corporation counsel; Letters detailing accident and making claim for damages mailed to finance department and by it delivered to corporation counsel constitute sufficient notice and filing thereof; Complaint defective when there is no allegation that comptroller of city has neglected or refused to make any adjustment or payment of plaintiff's claim. (Dis. op.)

Sweeney v. City of New York, 271, 278.

CRIMES.

Seduction; Evidence; Indictment for seduction under promise of marriage; Sufficiency of evidence corroborating testimony of complainant; Judgment of conviction should not be reversed on ground that corroborating evidence is insufficient. (Dis. op.)

People v. Taleisnik, 489, 497.

Motor vehicles; Violation of statute (Highway Law, ch. 30, § 290, subd. 3) requiring person who injures the person or property of another in operating an automobile to give his name and other facts to the injured person or a designated officer; Evidence; Res gestæ; When declaration of injured person admissible in evidence upon trial of defendant indicted for violation of said statute.

People v. Curtis, 519, 520.

CRANE, J.

ELECTIONS.

Purpose and scope of section 381 of Election Law; Ordinary writ of mandamus authorized thereby; When affidavit insufficient to warrant issuance of writ; Court cannot, under section 381 of Election Law, direct production of protested, void or blank ballots; Appellate Division cannot, under section 381, order judicial review of ballots cast; Order of Appellate Division modifying order is appealable of right to Court of Appeals. (Con. op.)

Matter of Whitman (No. 1), 1, 12.

Order that examination of ballots, upon application under section 374 of Election Law, shall take place after completion of canvass, proper.

Matter of Whitman (No. 2), 21, 22.

LABOR LAW.

Provision prohibiting employment of children under the age of fourteen years; Employer equally liable whether child is employed by himself or his agents; Must employ reasonable supervision to prevent violation of statute. (Con. op.)

People ex rel. Price v. Sheffield Farms, etc., Co., 25, 34.

JUDGMENT.

Public policy; Judgment confessed in favor of defendant to induce her to procure a divorce from plaintiff; Such judgment is against public policy and illegal and cannot be enforced. (Con. op.)

Schley v. Andrews, 110, 115.

LANDLORD AND TENANT.

Person other than lessee in possession of leasehold premises; Presumption and evidence that such person is in possession as assignee; When estopped from denying assignment; Annulment of lease by warrant removing tenant; When effect thereof abrogated by agreement of parties.

Mann v. Munch Brewery, 189, 192.

GAS COMPANIES.

Public service commission; South Glens Falls (village of); Contract of gas company to furnish gas to inhabitants of municipality at fixed rate for term of years;

Increase of such rates by company on the ground that they have become insufficient and confiscatory owing to increased cost of production; Power of public service commission to regulate such rates.
People ex rel. Vil. of S. Glens Falls v. P. S. Comm., 216, 218.

CONTRACT.

Execution of written contract purporting to be same as oral contract previously agreed upon by parties but guaranty of which was omitted in written contract; Party induced to sign such contract by false statements of contents thereof by other party; Action for breach of warranty of oral contract; When such action can be maintained and damages recovered.
(Con. op.)

Whipple v. Brown Brothers Co., 237, 246.

EVIDENCE.

Savings banks; Action to recover deposits paid to third party wrongfully in possession of depositor's bank book; Care and diligence required of bank to ascertain that person receiving money is entitled thereto; Burden of proof upon bank; Opinion evidence; When improperly admitted.

Noah v. Bowery Savings Bank, 284, 286.

ELECTION OF REMEDIES.

Principal and agent; Sale of goods to an agent of an undisclosed principal; Attempt to recover value of goods from agent after seller has knowledge of all the facts of the agency.

Georgi v. Texas Co., 410, 412.

CRIMES.

Seduction; Evidence; Indictment for seduction under promise of marriage; Corroboration required to support testimony of complainant; Judgment of conviction reversed on ground that corroborating evidence is insufficient.

People v. Taleisnik, 489, 490.

BILLS, NOTES AND CHECKS.

Payment of checks by bank after payment thereof stopped by drawer; In absence of ratification of such payment bank is liable therefor to the drawer.

American Defense Society v. Sherman Nat. Bank, 506, 507.

STOCK SUBSCRIPTIONS.

Construction of agreement proposed to be entered into by a syndicate composed of subscribers of bonds to be issued to build a proposed railroad and the railroad promoters as managers of the proposed syndicate; When such agreement signed by only one subscriber for bonds does not authorize promoters to borrow money on strength of such subscription; When subscriber who is not liable for such loan may have agreement and subscription canceled.

Jermyn v. Searing, 525, 529.

ANDREWS, J.

LIBEL.

When corporation may maintain action for libel without proof of special damage; If words complained of are ambiguous, their meaning and application are questions for jury; When entire publication may be shown.

First Nat. Bank v. Winters, 47, 49.

TITLE GUARANTY.

When vendee who at time of execution of contract of sale knew of defect in title cannot recover against drawer of contract and of subsequent deed for failure to protect him; Policy of insurance may define "loss" intended to be covered; When owner of real property may insure himself against defects in title of which he had knowledge; When dismissal of counterclaim pleading facts which would entitle insurer to reformation of policy is error.

Empire Development Co. v. Title G. & T. Co., 53, 55.

FOOD.

Implied warranty as to wholesomeness; Action may be maintained for breach; When such implied warranty exists; When inaccurate charge harmless.

Rinaldi v. Mohican Co., 70, 71.

INSURANCE (ACCIDENT).

Standard provisions of policy not whole contract; Rider part of policy and should be filed with superintendent of insurance; Effect of failure to file; Rider which does not contradict or vary standard provisions valid; Classification of risks; Provision that change in policy must be approved by officer of

company is for benefit of insurer; Provision that clause reducing indemnity must be printed in bold-face type when not applicable to rider.

Hopkins v. Conn. Gen. L. Ins. Co., 76, 78.

MASTER AND SERVANT.

Contract of employment; Compensation of salesman consisting in part of share of net profits; Inventory; Charges of depreciation of stock against profits for year; Effect of evidence that such charges were not made in good faith; Order of reference cannot be reviewed upon appeal from final judgment.

Bolles v. Scheer, 118, 120.

NEGLIGENCE.

Master and servant; Place to work; Dangerous situation; Questions of master's negligence for jury; Erroneous dismissal of complaint.

Turner v. Crystal Film Co., 268, 269.

Streets and sidewalks; New York (city of); Requirement of charter that notice of intention to bring action for injuries, caused by negligence of the city, must be filed with the corporation counsel; When letters detailing accident and making claim for damages mailed to finance department and by it delivered to corporation counsel constitute sufficient notice and filing thereof.

Sweeney v. City of New York, 271, 273.

STREET RAILWAYS.

Negligence; Horses attached to truck transporting pile driver through street, killed by electricity passing from trolley wires through truck; Whether railroad company was negligent in failing to raise wires to prevent accident question for the jury; Contributory negligence of persons driving truck question for the jury.

Chace Trucking Co. v. Richmond L. & R. R. Co., 435, 437.

CONTRACT.

Specific performance; Husband and wife; Execution of will by each giving all property to the other under an agreement that survivor should by will distribute the property among the next of kin of both; When the wife, who survived her husband, failed to comply with the agreement, the next of kin of her husband can maintain an action for the specific performance of the contract.

Morgan v. Sanborn, 454, 456.

BROKERS.

Commissions; When real estate broker who has negotiated a sale entitled to his commissions; Construction of contract providing that broker should receive his commissions on installments as paid by purchaser; Extensions of time to complete contract of sale; Broker's claim for commissions on unpaid installment; Question whether delay was caused by seller or purchaser for jury.

Colvin v. Post Mortgage & Land Co., 510, 513.

CONTRACT.

Construction and effect of letters constituting agreement to do certain work and fixing compensation therefor.

Clark v. Carolina & Y. Ry. Co., 589, 591.

PER CURIAM.

APPEAL.

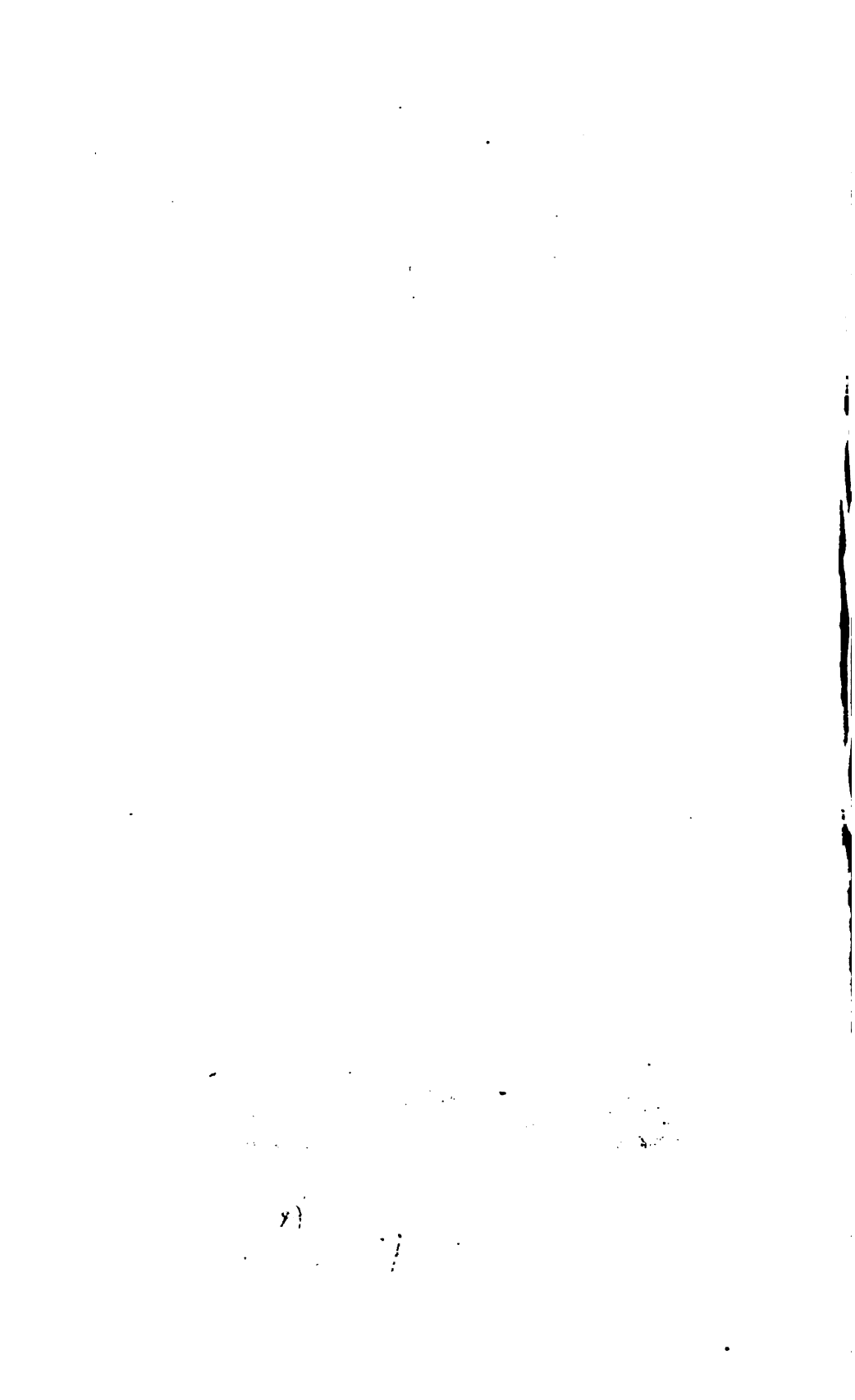
Orders intermediate in action not affecting final judgment. and discretionary orders, cannot be reviewed upon appeal from the judgment.

Rudiger v. Coleman, 662.

Not authorized direct to Court of Appeals from final judgment entered upon reversal of interlocutory orders.

Noble v. Kendall, 673, 674.

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